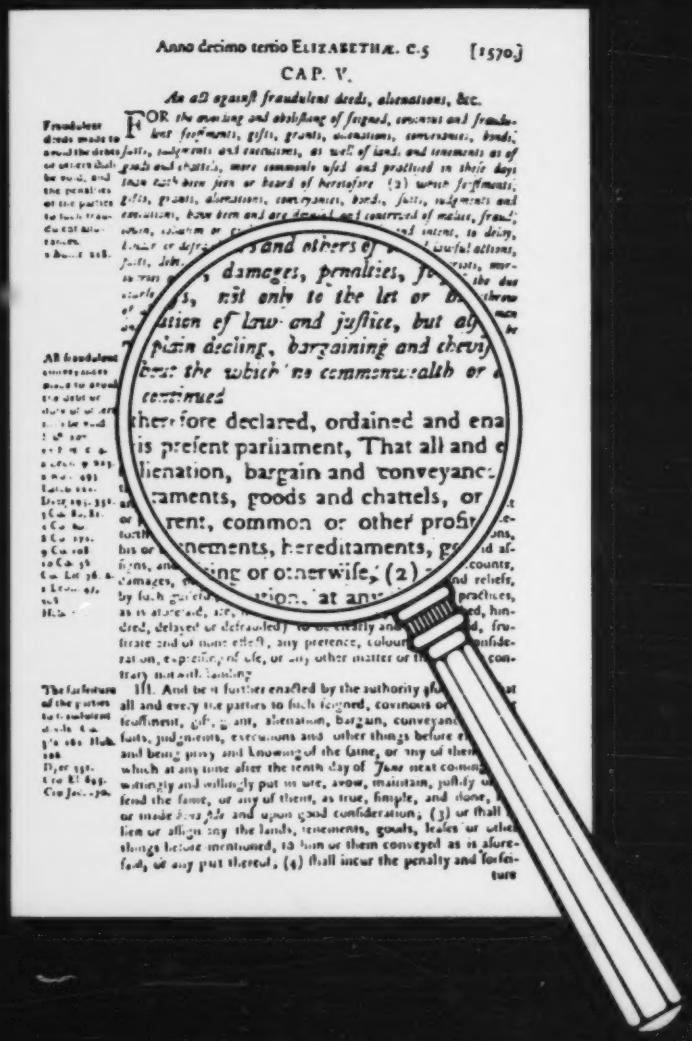
Law Reform Commission of Saskatchewan

Tentative Proposals For Changes In Limitations Legislation
Part II: The Limitation Of Actions Act

Saskatchewan



Anno decimo tertio ELIZABETHÆ. c. 5 [1570]

CAP. V.

An act against fraudulent deeds, alienations, &c.

Fraudulent deeds made to avoid the debts, &c. of others shall be void, and the penalties of the parties to such fraudulent alienations.

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than ever they have been heard of heretofore (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or [illegible] and intent, to delay, hinder or defraud [illegible] and others of [illegible] lawful actions, suits, debts, [illegible] damages, penalties, [illegible] the due [illegible] not only to the let or [illegible] of [illegible] ation of Law and justice, but also [illegible] plain dealing, bargaining and chevi[illegible] between the which no commonwealth or [illegible] continued

All fraudulent conveyances shall be void as against the debtor or others.

therefore declared, ordained and ena[illegible] this present parliament, That all and e[illegible] alienation, bargain and conveyanc[illegible] taments, goods and chattels, or [illegible] rent, common or other profi[illegible] tenements, hereditaments, g[illegible] and assigns, and [illegible] ing or otherwise, (2) [illegible] account, damages, [illegible] and reliefs, by such [illegible] ation, that any [illegible] practices, as is aforesaid, [illegible] ed, hindered, delayed or defrauded) to be utterly and [illegible] d, frustrate and of none effect, any pretence, colour [illegible] nsideration, especially of life, or any other matter or [illegible] contrary notwithstanding.

The forfeiture of the parties to fraudulent deeds &c.

III. And be it further enacted by the authority [illegible] at all and every the parties to such feigned, covinous or [illegible] fraudulent, gift, grant, alienation, bargain, conveyanc[illegible] suits, judgments, executions and other things before [illegible] and being privy and knowing of the same, or any of them [illegible] which at any time after the tenth day of June next comm[illegible] wittingly and willingly put in ure, avow, maintain, justify or [illegible] stand the same, or any of them, as true, simple, and done, [illegible] or made bona fide and upon good consideration, (3) or shall [illegible] lien or assign any the lands, tenements, goods, leases or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, (4) shall incur the penalty and forfeiture

86-04010/

Acknowledgement

Funding for the background research upon which the proposals in this report are based was provided in part by the Law Foundation of Saskatchewan.

TENTATIVE PROPOSALS FOR CHANGES IN LIMITATIONS LEGISLATION
PART II: THE LIMITATION OF ACTIONS ACT

Law Reform Commission of Saskatchewan

Saskatoon, Saskatchewan

May, 1986

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor Douglas A. Schmeiser, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman
Madam Justice Marjorie A. Gerwing of the Saskatchewan Court of Appeal
Mr. Gordon J. Kuski, Q.C., LL.B.

Mr. Kenneth P.R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J.W. Finley, B.A., M.A., LL.B., and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers, and Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting, and Mr. Stuart Bailey, B.A., LL.B. (of the Bar of Ontario), LL.M. are Legal Research Officers under contract.
The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

* * * * * * * * * * *

The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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N o t e
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These proposals have been prepared by the research staff of the Commission and have been approved by the Commission for the purposes of public discussion. A draft statute is included simply to indicate how the proposals might be implemented.

It is the policy of the Commission to seek response to its proposals before a final report is prepared for presentation to the Minister of Justice. Accordingly, the Commission invites comments and criticisms from the practising bar and other interested groups, and from the general public.

Submissions should be directed to:

Law Reform Commission of Saskatchewan
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SASKATOON, Saskatchewan
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I. INTRODUCTION

A. Historical Background

Statutes of limitation prescribe a fixed period of time within which an action may be brought. If the action is not brought within this period, and if the limitation period is pleaded as a defence, then the action is barred.

The common law did not recognize periods of limitation. This omission was mitigated by other procedural rules and formalities. For instance, a personal action on a tort did not survive the death of either the wrongdoer or the victim. The Courts of Equity developed the doctrine of laches by which the court could refuse equitable relief on the grounds of inordinate delay. This was a discretionary power, unlike the fixed periods of limitation that were later created by statute.

This is not to suggest that limitation statutes are a recent phenomena. English statues as early as 1236 enacted periods of limitation founded upon historical events. For instance, real property actions were prohibited if they were based on a seisin prior to the coronation of Henry II.[1] Of course, these statutes became increasingly less effective with the passage of time. It was not until 1540 that fixed time periods that ran from the accrual of the cause of action were enacted.[2]

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1 Pollock and Maitland, History of English Law 2nd ed., Canadian University Press, 1968, Vol. 3, at 51-53.

2 32 Henry 8, c.2.

The first statute to deal comprehensively with limitations was the English Limitation Act of 1623.[3] This legislation "marks the beginning of the modern law of limitations in personal actions in the common law" as it "established different periods for different sorts of actions, and liberal provisions for disabilities, the essence of which remains to this day".[4] A number of other limitation statutes were enacted over the next 250 years, and a more or less coherent law of limitations evolved. Those English statutes that were enacted before July 15, 1870 were received into the law of Saskatchewan.

In 1931 a major revision was undertaken in Canada by the Uniform Law Conference, which resulted in the Conference's adoption of a uniform Limitation of Actions Act. The Saskatchewan Limitation of Actions Act[5] of 1932 was based on this document. The Act gathered together the various Imperial statutes, as well as some more recent statutory provisions from England and Ontario.[6] A number of limitation periods were revised; for example, the time period for actions for physical injury to the person was changed from six to two years.

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3 21 Jac. 1, c.16.

4 "Developments in the Law - Statutes of Limitations" (1950), 63 Harv. L. Rev. 1177, at 1178.

5 S.S. 1932, c.18; now R.S.S. 1978, c.L-15.

6 See "Draft Limitation of Actions Act with the Draftsman's Annotations" (1930), Proceedings of the 22nd Annual Meeting of the Conference of Commissioners on the Uniformity of Legislation in Canada, at 24.

Our present Act still bears heavily the imprint of English limitation law. It shares the English preoccupation with estates in land. Today such provisions are often no more than a curiosity to lawyers operating within a system dominated by The Land Titles Act.[7] A number of sections dealing with conditional sales agreements and agreements for sale of land were added in 1933,[8] but otherwise the statute remains substantially unchanged.

B. Reform in Other Common Law Jurisdictions

The work of the Uniform Law Conference during the 1930's was very much a pioneering effort. England followed in 1936 with a report recommending reform of limitations law, and since then has periodically reviewed limitation law.[9] England substantially implemented the report with the enactment of the Limitation Act of 1939.[10] A number of revisions followed,[11] which recently have

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7 R.S.S. 1978, c.L-5.

8 S.S. 1933, c.17; now R.S.S. 1978, c.L-15, ss.36-41.

9 Fifth Interim Report, 1936, Cmnd. 5334; Report of the Committee on the Limitation of Actions, 1949, Cmnd. 7740; Report of the Committee on Limitation of Actions in Cases of Personal Injury, 1962, Cmnd. 1829; Limitation Act, 1963, 1970, Law Com. No. 35, Cmnd. 4532; Law Reform Committee, Twentieth Report (Interim Report on Limitation of Actions: in Personal Injury Claims) (1974), Cmnd. 5630.

10 2 & 3 Geo. 4, c.21.

11 Law Reform (Limitations of Actions) Act, 1954, c.36; Limitation Act, 1963, c.47; Limitation Act, 1975, c.54.

been consolidated in the Limitation Act, 1980.[12]

By far the greatest recent contribution to the reform of limitations law outside England has come from the studies of three law reform bodies. The New South Wales Law Reform Commission in 1967 completed a major study on limitations.[13] It contained a draft bill, which was subsequently enacted.[14] The Ontario Law Reform Commission issued a report on limitations in 1969.[15] It examined the English reform as well as the innovations contained in the New South Wales Report. In 1974 the Law Reform Commission of British Columbia produced a comprehensive report.[16] To a large degree it built upon the research of the Ontario and New South Wales Commissions. Its recommendations were adopted by the Legislature of British Columbia in 1975.[17]

The Ontario Ministry of the Attorney General in 1977 issued a discussion paper on a proposed Limitations Act.[18] The draft Bill was modelled closely on the British Columbia statute, and

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12 c.58.

13 First Report on the Limitation of Actions (1967), L.R.C. 3 (hereafter referred to as the "N.S.W. Report").

14 S.N.S.W. 1969, Act No. 31.

15 Report on Limitation of Actions (1969), (hereafter referred to as the "Ontario Report").

16 Report on Limitations (1974), Project No. 6, (hereafter referred to as the "B.C. Report").

17 Limitations Act, S.B.C. 1975, c.37; now R.S.B.C. 1979, c.236.

18 Ministry of the Attorney General, Discussion Paper on Proposed Limitations Act (1977).

departed from the Ontario Commission's recommendations in a number of instances. A Bill was introduced into the Ontario Legislative Assembly, and received first reading on December 16, 1983.[19] The Bill subsequently died on the order paper. The Alberta Institute of Law Research and Reform[20] in 1977 issued a working paper which also proposed a statute along the lines of the B.C. Act.

In 1979 the Uniform Law Conference again examined limitations law.[21] The Ontario draft was chosen as the basis for a new uniform Limitations Act. The Newfoundland Law Reform Commission recently published a working paper which examined the province's limitations law. It recommended that a statute substantially similar to the new Uniform Act be adopted.[22]

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19 Bill 160, 3rd Sess., 32nd Legislature.

20 Working Paper - Limitation of Actions (1977) (hereafter referred to as the "Alberta Report").

21 Uniform Law Conference of Canada, Proceedings of the 61st Annual Meeting (1979), at 155.

22 Working Paper on Limitation of Actions (1985), N.L.R.C.-WP 1 (hereafter referred to as the "Newfoundland Report").

Alberta,[23] Manitoba[24] and Nova Scotia[25] have also introduced more limited changes to their limitations law.

C. The Saskatchewan Commission's Approach

In 1981 the Law Reform Commission of Saskatchewan published tentative proposals concerning the effect of limitations law on title to real property.[26] This addressed a problem unique to Saskatchewan, and proposed changes within the context of existing limitations law. In 1983, an unpublished background paper on general limitations law was completed.[27]

Over the course of its review, the Commission identified three basic approaches that have been taken to reform of limitations law. The approach taken by most law reform bodies is

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23 In 1966 Alberta amended its limitation statute in relation to tort actions: An Act to amend the Law respecting Limitation of Actions in Tort, S.A. 1966, c.49.

24 Manitoba amended its legislation in 1967 (respecting the extension of time for absence of knowledge) and 1980 (respecting the extension of time for disabilities). See S.M. 1966-67, c.32; S.M. 1980, c.28. The latter amendment adopted the recommendations of the Manitoba Law Reform Commission, Report on Limitation of Actions: Time Extensions for Children, Disabled Persons and Others (1979), Report No. 27.

25 An Act to amend The Statute of Limitations, S.N.S. 1982, c.33, s.2.

26 Tentative Proposals for Changes in Limitations Legislation - Part I: The Effect of Limitations on Title to Real Property.

27 Background Paper on Limitation of Actions (1983), Parts A & B. Copies of this paper may be obtained from the Commission.

to retain the regime of fixed periods, but to modernize limitations law to reflect the developments that have occurred over the last half century.

The second approach is to provide fixed periods, but to give discretion to the court to permit an action to proceed even though the limitation period has expired. The statute might also limit the number of years within which this discretion may be exercised. This would be in essence a statutory integration of the equitable doctrine of laches into limitations law. No jurisdiction has completely embraced such an approach, though some have done so for certain specified actions.[28] Nova Scotia has recently amended its limitations law to provide that the court may, in its discretion, permit the bringing of an action after the expiry of the two year period for most personal actions.[29] The discretion may, however, only be exercised within four years from the cessation of the original two year period.

The third approach is to provide a single limitation period for all actions. The limitation period would be for a relatively short period of years (either two, three or four years might be chosen), but would not begin to run until the plaintiff had, or ought to have had, knowledge of the facts upon which his action

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28 England has adopted a discretionary approach in cases involving personal injuries: see Limitation Act, 1980, c.58, s.33. The Law Reform Commission of Western Australia has also recommended a similar approach: see Report on Limitation and Notice of Actions: Latent Disease and Injury (1982), Project No. 36 - Part I.

29 An Act to amend The Statute of Limitations, S.N.S. 1982, c.33, s.2.

is based. This could be subject to an ultimate limitation period that would run from the accrual of the action (between ten and thirty years). On the expiry of this period the action would be barred even if the plaintiff did not have knowledge of the facts. Alternatively, in place of an ultimate limitation period, a mechanism might be provided by which the court may disallow the action if it is established that the delay has prejudiced the defendant.[30]

The Commission believes that the problems with the present limitations law can be remedied without eliminating the system of fixed time periods. The introduction of a new untried system of limitations would remedy the deficiencies in the present law, but it might also introduce new and unanticipated problems. In addition the Commission recognizes that uniformity in limitations law is desirable. By all indications, future reform in other provinces will be along the lines of the Uniform Act. For these reasons the Commission has decided to build on the work of the New South Wales, Ontario and British Columbia Commissions.

The Commission is of the view that the present system of fixed periods should be retained, but that certain features of the present law which appear to give unwarranted protection to potential defendants should be modified. In formulating its

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[30] The background paper prepared for the Commission proposed the adoption of this type of system. It is the Commission's understanding that the Alberta Institute of Law Research and Reform is also examining the feasibility of such a system of limitations.

proposals, the Commission has examined the policy reasons that have been offered for the existence of limitation periods. The more plausible reasons are as follows:

(1) Evidentiary problems are likely to become greater as time passes. Limitation rules ensure that litigation is not started so long after the event that adjudication on the merits is impossible.

(2) It is not fair that an individual should be subject indefinitely to the threat of being sued. It may be harsher to allow a dormant claim to be revived than to prevent its resurrection by the imposition of a limitation period.

(3) It is not in the interests of the general community that disputes be capable of dragging on interminably. Limitations minimize the disruptive effect of long unsettled claims.

The Commission takes the position that the primary purpose of limitations is to ensure that actions are commenced within a reasonable time. The evidentiary problem and the unfairness to the individual at risk are factors, but the primary reason is that potential claims should not remain unsettled. An example of this shift of emphasis can be found in the Commission's proposal that the limitation period should not begin to run until the damage or injury has been discovered. This is clearly a rejection of any argument that potential defendants deserve an absolute assurance that after the passage of a fixed number of years they will be free of liability. The evidentiary problem that may exist is also rejected as an overriding rationale. Instead, the exception is justified because it is unreasonable to expect a plaintiff to commence an action if he does not know of his injury.

The choice of time periods has always been arbitrary to some degree. Limitation periods of three years, five years and eight years could easily replace the present periods of two years, six years and ten years. The Commission has for the most part retained the traditional periods because they are well known to the legal profession and because there is a fair degree of uniformity with other provinces and other common law jurisdictions.

The Commission has, however, proposed a significant change to this system. It has recognized that the judicial classification of actions as contractual or delictual is no longer an appropriate criteria on which to found the limitation periods. The massive expansion of the tort of negligence over the last fifty years has undermined this classification. Increasingly, actions in contract and in tort are found to co-exist. In such areas of overlap, functional criteria should be adopted. The choice of limitation periods should no longer depend on whether the action is based on contract or tort.

D. Limitation Periods under the Present Act and the Proposed Limitation Periods

Four periods of limitation are created by the present Limitation of Actions Act. Periods of one year, two years, six years, and ten years apply as follows:

One Year:	Section
Actions by informer or person authorized to sue (not being aggrieved) for penalty imposed by statute.	3(1)(a)

Two Years:

Actions for penalties, damages or sums in the nature of penalties given by a statute.	3(1)(b)
Actions for defamation.	3(1)(c)
Actions for trespass to the person, assault, battery, wounding or other personal injury whether in negligence or not, false imprisonment, malicious prosecution, or seduction.	3(1)(d)

Six Years:

Action for trespass or injury to chattels whether arising from an unlawful act or from negligence.	3(1)(e)
Action for recovery of money, whether as debt or damages, and for account.	3(1)(f)
Action for fraudulent misrepresentation.	3(1)(g)
Action grounded on accident, mistake or other equitable ground.	3(1)(h)
Action for recovery of arrears of rent or damages in respect thereto.	14(1)

Ten Years:

Action on a judgment or order for the payment of money.	3(1)(i)
Action for the recovery of rent charge, money secured by land, a legacy or the personal estate of an intestate.	12(1)
Action for recovery of money payable under any agreement for sale of land.	13
Action for recovery of land.	18
Action by mortgagor to redeem mortgage in respect of land in possession of mortgagee.	33(1)
Action to foreclose on a mortgage.	34

Action on agreement for sale of land.	36(1)
Action by vendor to foreclose or cancel agreement for sale.	37
Proceedings for the sale of or the recovery of goods under a conditional sale.	40

These periods generally begin to run from the accrual of the cause of action. Special exceptions are made where the plaintiff is suffering from a disability, or where there has been an acknowledgement or part-payment of a debt. Certain actions against trustees are not limited by time. Any other action not specifically mentioned is subject to a six year limitation period.

The adoption of the Uniform Act in 1932 went far in simplifying limitation periods. The Commission is, however, of the opinion that further rationalization of the periods is possible. The Commission is of the opinion that limitation periods of two years, six years and ten years should be chosen. These periods would apply as follows:

Two Years

Action based in contract or tort other than an action specifically covered by some other limitation period.

Action under The Fatal Accidents Act.

Action in tort under The Privacy Act.

Civil action by the Crown or any other person to recovery a fine or other penalty.

Ten Years

Action on a judgment for the payment of money or the return of personal property.

Action against a personal representative for a share of the estate.

Actions against a trustee for fraudulent breach of trust, for conversion of trust property to his own use.

Action to recover trust property or property into which trust property can be traced.

Action to recovery money on account of a wrongful distribution of trust property against the person to whom it is distributed.

Six Years

Action to recover a debt.

Action for damages for conversion or detention of goods or chattels.

Action for goods or chattels wrongfully taken or detained.

Restitutionary actions, other than those based on a constructive trust.

All other actions not specifically provided for.

In addition, the Commission proposes that actions that are not subject to any limitation period should be expressly set out in the statute.

II. APPROPRIATE PERIODS - PERSONAL ACTIONS

A. Penalties under Statute

The present Act makes a distinction between an action for a penalty imposed by a statute brought by the Crown or aggrieved person and actions for penalties brought by others. In the former instance a two year limitation applies; in the latter, a one year period. The Commission is of the view that a two year period should apply to both. Although not uncommon in the past, most statutes today do not permit recovery of penalties by persons other than the Crown. However, such provisions may in future offer a useful method of policing compliance with environmental standards.[31] Legislators should not as a rule permit the recovery of penalties by persons other than the Crown. If, however, they decide that such an action is appropriate, there is no reason why it should be subject to a shorter limitation period.

B. Actions in Contract and Tort

The time period respecting an action for physical injury to the person or property may vary depending on whether the action is framed in contract or tort (actions for breach of contract are subject to a six year period, while personal injuries actions are

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[31] See, for example, section 5 of the Penalties and Forfeitures Proceeds Regulations, C.R.C. 1978, c.827 promulgated under the Fisheries Act, R.S.C. 1970, c.F-14, which permits the complainant to recover one-half of the penalty.

subject to a two year period). At the time the Uniform Act was enacted, there was thought to be a distinct boundary between contract and tort. Today, it is accepted that in many cases the boundaries will overlap, and the same act might give rise to a cause of action sounding in both contract and tort.[32] This is commonly the case where the injury is caused by professional negligence.[33]

A distinction is also made between injury to the person and injury to property. The same wrongful act of a person may cause both types of damage, yet two different periods apply. Thus, a victim of an assault may recover damages for his broken watch but not for his broken nose after two years has passed.

The length of the limitation period should not depend on whether the action is framed in contract or tort. Nor should it depend on whether the victim has suffered injury to his person or to his property. The same sort of proof is necessary in both cases. The same limitation period should apply.

The British Columbia Law Reform Commission recommended that a two year limitation period be assigned to an action:

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32 See Nicholas Rafferty, "The Impact of Concurrent Liability in Contract and Tortious Negligence Upon the Running of Limitation Periods" (1983), U.N.B.L.J. 189; Joost Blom, "The Evolving Relationship between Contract and Tort", (1985), 10 C.B.L.J. 257.

33 See infra, Chapter IV for a further discussion of the problems of characterization.

> for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty.[34]

Actions for professional negligence or negligent misrepresentation that do not result in physical injury would be subject to a six year limitation period. The Commission does not think that a distinction between negligence causing physical damage and negligence causing economic loss should be drawn. It does not make sense to afford a two year limitation period for an action against an architect whose negligence causes physical injury to a building, but a six year limitation for an action against a lawyer for negligently filing a caveat. Both cases are based upon a breach of duty of care, and should be treated similarly.

Both the Alberta Institute of Law Research and Reform and the Newfoundland Law Reform Commission[35] have proposed an extension of the British Columbia formulae. Like the British Columbia formula, actions in respect of physical injury to persons or property, whether founded in contract or tort would be subject to a two year period. But, in addition, the Alberta and Newfoundland law reform bodies have proposed that an action based on breach of duty of care, whether founded in contract or tort, would also be subject to a two year period.

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[34] Limitation Act, R.S.B.C. 1979, c.236, s.3(1)(b).

[35] Alberta Report, at 4-10; Newfoundland Report, at 34-53.

Although this extension eliminates the most glaring problems, it leaves many smaller inconsistencies. For example, where a misrepresentation made in pre-contractual negotiations induces the contract, an action based on negligent misrepresentation would be governed by a two year limitation period, while an action based on fraudulent misrepresentation, or equitable relief for innocent misrepresentation would be governed by a six year limitation period. An action for breach of the implied condition of fitness for purpose in a contract of sale does not involve a contractual duty of care: it is a promise that the goods will be fit. However, in a contract for work and labour there is a promise to use reasonable skill and care.[36] Therefore, a six year limitation period would govern the action for breach of contract of sale while a two year period would govern a breach of a contract for work and labour. Because it is often notoriously difficult to differentiate between these two types of contracts,[37] one might expect increased litigation on this sterile distinction. The problem is exacerbated by the extension of the duty of care to the prevention of pure economic loss.[38] A buyer's action against a manufacturer for a shoddy

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36 See Kendall (Henry) & Sons (a firm) v. Lillico (Williams) & Sons Ltd. [1968] 2 All E.R. 444, at 457 per Lord Reid (H.L.).

37 See Robinson v. Graves, [1935] All E.R. Rep. 935 (C.A.).

38 See Junior Books Ltd. v. Veitchi Co. Ltd., [1982] 3 All E.R. 201 (H.L.).

product would be subject to a two year period, while the action against the seller in contract would be subject to a six year period.

As well, it may be difficult in some cases to distinguish between physical injury and economic loss.[39] In determining whether a duty of care should be found to exist, Lord Roskill in Junior Books Ltd. v. Veitchi Co. Ltd. stated:

> I think today the proper control lies not in asking whether the proper remedy should lie in contract or instead in delict or tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not (it is sometimes overlooked that virtually all damage including physical damage is in one sense financial or economic for it is compensated by an award of damages) but in the first instance in establishing the relevant principles and then deciding whether the particular case falls within or without those principles.[40]

The same thing might well be said of limitation periods. It is time to throw off the distinction between contract and tort as a reason for different periods of limitation. The Alberta and Newfoundland law reform bodies have gone half-way towards this. The Saskatchewan Commission proposes that the final step be taken.

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39 See Chabot v. Ford Motor Co. of Canada Ltd. (1982) 138 D.L.R. (3d) 417 (Ont. H.C.J.). A claim by a consumer against a manufacturer in respect of a shoddy product is generally thought to be a claim for economic loss. However, in this case, a defective product which destroyed itself was said to have amounted to physical injury.

40 Supra, note 38, at 213.

Actions in contract and actions in tort should be subject to the same limitation periods and rules. The distinction that then emerges is between actions for damages and actions for non-payment of debt and detention or conversion of property. The justification for this line of demarcation is that a person should be given greater leeway before his property interest or his right to recover a debt is extinguished. Where, however, the person is harmed by a breach of duty or breach of contract, it is natural to assume that an action for compensation will be initiated soon after the breach. It is true that contractual principles are invoked in respect of actions in debt, while tort law provides the method of protecting rights in property. Nevertheless, the distinction remains valid. It has been noted that:

> Debt, detinue and ouster "sound in property" and in this respect differ from claims ("in contract" or "in tort") not founded upon deprivation or misappropriation of property. The assessment of damages in property-"contracts" (debt) and in property-"torts" (detinue, ouster) sets such "contracts" in a category apart. In both, the property element outweighs the modern affiliation of the legal relation to the domain of contract or, as the case may be, of tort.[41]

For these reasons, the Commission proposes that a two year limitation period apply to personal actions in tort and in contract, other than actions for debt and actions for the conversion or detention of property.

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[41] A.V. Levontin, "Debt and Contract in the Common Law" (1966), 1 Isr. L. Rev. 60, at 84.

C. Other Actions Subject to a Two Year Period

The Commission has proposed that actions in contract and in tort should be subject to a two year limitation period, except where a different limitation period is expressly provided for. There are also a number of actions that are created by statute but which are sufficiently analogous to tort actions to warrant inclusion. The Commission proposes that actions by dependants under The Fatal Accidents Act,[42] and actions for breach of privacy under The Privacy Act[43] be subject to a two year limitation period.

D. Trusts

The present limitations statute contains a number of provisions relating to trustees. These have been consolidated from earlier English statutes, and because of this the provisions are often difficult to understand. It is helpful to outline the development of the law in this area.

Section 42 of the present Act has its origin in the Supreme Court of Judicature Act, 1873,[44] though that Act did no more than restate a rule applied by the Courts of Equity.[45] The section provides:

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42 R.S.S. 1978, c.F-11.

43 R.S.S. 1978, c.P-24.

44 36 & 37 Vict., c.66, s.25(2).

45 Rule 1 of section 43 of The Queen's Bench Act, R.S.S. 1978, c.Q-1 also codifies this rule.

> Subject to the other provisions of this Part, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of trust, shall be held to be barred by this Act.

Statutes of limitation originally applied only to common law actions. Courts of equity would, however, apply those limitation periods by analogy in appropriate cases. But since there was no meaningful analogy that could be applied to the relationship of trustee and beneficiary, and because of vulnerability of the beneficiary, the courts of equity held that mere lapse of time did not deprive a beneficiary of his claim.

This principle was eroded in the 19th century. Professor Donovan Waters indicates that:

> ...the great age of law reform in England which lasted from 1830 to the close of the century brought with it a desire that all land titles should be stabilized by limitation periods, and that in general the honest trustee should enjoy with others an ultimate freedom from the possibility of litigation.[46]

The Real Property Limitations Act, 1833[47] provided that a legacy under a will, whether or not it is charged on the land, was not recoverable after the expiration of ten years. Arrears of rent were not recoverable after six years. These periods applied even though the legacy or arrears might be charged on the land by way of an express trust. These provisions are reproduced in sections 12, 14 and 16 of the present Saskatchewan Act. The 1833 Act also provided that where an express trustee conveys land

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[46] Law of Trusts in Canada 2nd ed., Toronto: Carswell, 1984 at 1016.

[47] 3 & 4 Will. 4, c.40.

to a purchaser for valuable consideration, the beneficiary's right to claim against the purchaser is deemed to have accrued at the time of the conveyance. This appears as section 44 of the present Act.

The most massive inroad into the principle that actions against trustees should not be limited by time occurred in 1888 with the passage of the English Trustee Act.[48] The unfortunate wording of section 8 of that Act has been substantially adopted by section 43 of the Saskatchewan Limitation of Actions Act, which reads as follows:

> (1) In this section "trustee" includes an executor, an administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
>
> (2) In an action against a trustee of a person claiming through him except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use:
>
> (a) all rights and privileges conferred by this Act shall be enjoyed in the same manner and to the same extent as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee;
>
> (b) if the action is brought to recover money or other property, and is one to which no limitation provision of this Act applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to the action in the same manner and to the same extent as if the claim had been against him in an action for money had and received, but no limitation provisions of this Act shall

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[48] 51 & 52 Vict., c.59.

> begin to run against a beneficiary unless and until the interest of the beneficiary becomes an interest in possession.

Professor Waters states that:

> What it attempted to provide was that a six year period should govern, unless any action for breach brought by a trust beneficiary should by analogy fit within a category of causes of action for which another period of limitation was provided by statute.[49]

The provision was enacted because it was thought that the exposure to liability of an honest trustee should not differ from that of any other businessman. Claims based upon a honest breach of trust, such as a mistaken investment, should be subject to a limitation period.

The fraudulent trustee is clearly exempted from this provision, as is the trustee who has retained trust property or who has converted it to his own use. In such cases, the beneficiaries claim will not be barred by time. A literal reading of this section would lead one to believe that a constructive trustee who has retained trust property or who has converted it to his own use will not enjoy the benefit of a limitation period. Such is not the case. In Soar v. Ashwell[50] and in Taylor v. Davies[51] the courts found that the section had been passed for the relief of trustees and should not therefore be given a meaning which altered for the worse the position of the constructive trustee (who was treated differently by the

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[49] Supra, note 46, at 1017.

[50] [1893] 2 Q.B. 390; [1891-1894] All E.R. Rep. 991 (C.A.).

[51] (1920), 51 D.L.R. 75 (P.C.).

Courts of Equity, it having been settled that a limitation period would run from the time of his taking possession). Viscount Cave in Taylor v. Davies stated:

> The expressions "trust property" and "retained by the trustee" properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction.[52]

In certain cases a person who is not named as an express trustee will be treated as one. Bowen, L.J. in Soar v. Ashwell indicates that "a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property".[53]

It is apparent that the limitations law relating to actions for breach of trust is in a sorry state. Although section 43 on the face of it applies to all trustees, the courts have made a distinction between express and constructive trustees. Even then, some constructive trustees are to be treated as express trustees. Waters states that the line of demarcation between those constructive trustees who were to be treated as an express trustee and those constructive trustees who were not to be so treated "was never clearly drawn throughout the nineteenth

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52 Ibid., at 86.

53 [1891-1894] All E.R. Rep. 991, at 995.

century, and it is probable that such a distinction cannot effectively be drawn".[54] Section 43 provides that in that section "trustee" includes an executor and an administrator, but the other sections are silent on this point.

The Ontario Law Reform Commission has identified five questions that must be answered in order to provide the necessary clarification and simplification of the law:

1. (a) To what extent, if any, should claims for breaches of trust be subject to limitation periods?

   (b) In particular, should claims for fraudulent breaches of trust be governed by a limitations period?

2. Is there any justification for maintaining any distinction between express and other trusts?

3. Should executors and administrators be treated as trustees for the purpose of limitations?

4. What period or periods would be most appropriate?

5. At what point should the period begin to run when the beneficiary is unaware that he has a cause of action?[55]

The Commission is of the view that a good deal of confusion would be eliminated if express, resulting and constructive trustee, and personal representatives were treated similarly for the purposes of limitations law. This position has been accepted in New South Wales, England and British Columbia.

There is no such consensus respecting the position of the

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[54] Supra, note 46, at 1018.

[55] Ontario Report, at 58.

fraudulent trustee. The English Limitations Act, 1939[56] retained the rule that fraudulent breaches of trust should not be limited by time. The New South Wales Commission disagreed:

> Under the law as it stands, a beneficiary under no disability and knowing of his rights may wait, subject to questions of laches and acquiescence, for thirty or forty or more years and then call upon his trustee (or the executors of the trustee) to meet charges of fraud in relation to events of which all documentary and other evidence is likely to be lost. This is wrong and should be changed.[57]

The Ontario Law Reform Commission supported this, but also thought that the running of the time period should be delayed in certain cases:

> A beneficiary should not be required to be reasonably diligent in ensuring that the trustee acts properly. The very nature of a trust pre-supposes a confidence in the trustee. The elderly widow, who is the benficiary of a trust established under her husband's will, relies on the trustee almost as a friend. She should not be required to be on guard against him. The Commission has concluded, therefore, that claims for serious breaches of trust should be governed by a limitation period, but that time should only run against the beneficiary when he becomes aware of the breach. The limitation period should be relatively long and the Commission recommends ten years.[58]

The Law Reform Commission of Saskatchewan agrees with this view. Accordingly, the Commission proposes that serious breaches of trusts should be subject to a ten year limitation period, and that all other periods should be subject to the general six year

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56 2 & 3 Geo. 6, c.21, s.31(1); now Limitation Act, 1980, c.58, s.21(1).

57 N.S.W. Report, at para. 230.

58 Ontario Report, at 60.

period.[59] Furthermore, time should not run against a beneficiary in respect of a fraudulent breach of trust, or for the recovery of trust property from the trustee, until the beneficiary becomes fully aware of the act.

E. Restitutionary Actions

It has been said that the "present restitutionary causes of action fit uncomfortably within the traditional confines of the limitation statutes".[60] At present a restitutionary action will generally be governed by a six year limitation period. The common law restitutionary action of money had and received will constitute an action for the recovery of money,[61] while actions for quantum meruit and quantum valebant will be governed by the six year residual limitation period.[62] An action for an account or for not accounting is also subject to a six year limitation period.[63] Where the claim is made on the basis of a constructive trust, the court must apply a limitation period by analogy, but if no analogy can be drawn then a six year limitation period will

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59 It is necessary, therefore, to repeal Rule 45.1 of The Queen's Bench Act as well.

60 Fridman & McLeod, Restitution, Toronto: Carswell, 1982 at 598.

61 The Limitation of Actions Act, R.S.S. 1978, c. L-15, s.3(1)(f)(i).

62 Ibid., s. 3(1)(j).

63 Ibid., s. 3(1)(f)(ii).

be applied.[64] But if the constructive trust is grounded upon a fiduciary relationship that is sufficiently similar to a trust relationship, and the constructive trustee is in possession of the trust property, then it is open to the court to find that the action is not subject to a limitation period.[65]

It is exceedingly difficult to predict when a restitutionary cause of action will be found to accrue, thereby triggering the running of time. In some cases, the court will imply a promise to pay a reasonable sum per annum, where the benefit is in the form of services, and therefore permit recovery only in respect of the last six years.[66] In other cases, the court will not imply such a promise, but will find that the cause of action accrues when it became certain that the anticipated remuneration would not be paid.[67]

The law of restitution or unjust enrichment -- Canadian law is as yet uncertain of the action's juridical foundation -- is very much in an early stage of development.[68] It is difficult to create a coherent system of limitation periods governing restitutionary actions when the nature and boundaries of the restitutionary claim is unsettled. Since the "principle to

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64 Ibid., s. 43(2).

65 Supra, at 23-24.

66 See Meston v. Gray, [1925] 3 W.W.R. 656 (Sask. C.A.).

67 See Degelman v. Guaranty Trust Company of Canada, [1954] S.C.R. 725.

68 See Klippert, Unjust Enrichment, Toronto: Butterworth, 1983.

unjust enrichment lies at the heart of the constructive trust",[69] should not the limitation period governing constructive trusts be the same as those governing other restitutionary claims? Or should the constructive trust be treated in the same manner as express, implied and resulting trusts, as is the case in British Columbia?[70] Although logic perhaps suggests the former course, this Commission, for practical reasons, prefers the latter. The constructive trust is commonly used in family disputes relating to property. The claim may be on the basis of a resulting trust, or it may be grounded on a constructive trust. It would be unfortunate if a distinction were drawn between such claims for limitation purposes. Nor does the Commission propose to tinker with the time when the restitution cause of action accrues. The Commission agrees with Fridman and McLeod that the various types of restitutionary causes of action are too diverse for such generalization: it is for the court to "break down each restitutionary cause of action into its constituent elements and to determine when the final element occurred".[71]

The Commission therefore proposes that a six year limitation period should govern actions for restitution or for unjust enrichment, other than claims based on a constructive trust. The constructive trust will therefore be subject to a more lengthy (ten year) limitation period. It is important that the equitable

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69 Pettkus v. Becker, [1980] 2 S.C.R. 834, at 847.

70 Limitations Act, R.S.B.C. 1979, c. 236, s. 3(2).

71 Fridman & McLeod, Restitution, supra, note 60 at 601.

limitation rules -- the doctrine of laches and acquiescence -- be retained. This will give to the court the power to cut down the rather lengthy limitation period afforded the constructive trust where it thinks just and proper to do so. Accordingly, it is proposed that the legislation expressly provide that such defences be retained.

F. Actions on Judgments

It is important to distinguish actions on judgments from the right to issue execution under a judgment. Only the former is caught by the ten year limitation period contained in clause 3(1)(i) of The Limitation of Actions Act. The latter is essentially a matter of procedure, and is governed by the rules of court. Rule 358 of The Queen's Bench Rules provides that a writ of execution remains in force for a period of ten years from the date of the judgment or order.

An action on a judgment will generally be necessary only to extend the execution process for additional ten year periods. The action on a judgment may be initiated by notice of motion and will result in the entering of a new judgment.[72] A new writ of execution can then be obtained under this judgment. Section 36 of The Executions Act[73] provides that the new writ has the same priority as the expired writ.

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[72] Sask. Q.B. Rules, Rule 347.

[73] R.S.S. 1978, c.E-12.

The Commission is of the opinion that this is a workable system that should be retained. For greater certainty, the definition of judgment should include an order of the court. A shorter period of six years should, however, apply to actions to realize on foreign judgments. At present, foreign judgments are subject to a six year period by virtue of a legal fiction that the liability of the defendant rests upon an implied contract to pay the amount of a foreign judgment.[74]

Finally, it should be emphasized that not all judgments or orders need to be enforced. Judgments determining status do not require enforcement: there is nothing further to be done. An action relating to the enforcement of an injunction or restraining order should similarly be excepted from the ten year limitation period. Although it is perhaps not strictly necessary to do so, it is desirable that these be included in the list of actions that are not governed by any limitation period (most of which are concerned with property, and will be discussed in the chapter that follows).

G. The Residual Period

The present limitations statute provides a six year "catch-all" or residual period for actions not otherwise specifically provided for. The Commission is of the view that this feature should be retained. However, rather than retaining it as an isolated provision, all actions subject to the six year period

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[74] Grant v. Easton (1833), 13 Q.B.D. 302.

should be set out in a single provision. Although it is not strictly necessary to do so, the Commission thinks that it would be helpful if the major actions subject to the six year period - such as actions for debt, actions for conversion or detention of chattels, and restitutionary actions should be specifically mentioned. In addition, certain actions should be specifically mentioned where there might be some confusion as to what was intended.

H. Summary of Proposals

1. Actions for penalties be subject to a two year period, whether or not the action is instituted by the Crown.

2. Actions in contract and actions in tort other than actions for debt and actions for conversion or detention of chattels should be subject to a two limitation year period.

3. Actions for breach of privacy under The Privacy Act and actions by dependants under The Fatal Accidents Act should be subject to a two year limitation period.

4. No distinction should be made between express, resulting and constructive trusts for the purposes of limitations law.

5. Personal representatives should be treated as trustees for the purposes of limitations law.

6. The following actions should be subject to a ten year limitation period:

   (a) an action against the personal representative for a share of the estate;

   (b) an action against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was privy;

   (c) an action against a trustee for the conversion of trust property to the trustee's own use;

(d) an action to recover trust property or property into which trust property can be traced against a trustee or any other person;

(e) an action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor.

7. All other actions brought in respect of a breach of trust should be subject to a six year limitation period.

8. Time should not run against a beneficiary in an action:

(a) based on fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use;

until the beneficiary becomes fully aware of the breach.

9. Rule 1 of section 45 of The Queen's Bench Act should be repealed.

10. Actions based on restitution or unjust enrichment, other than actions based on a constructive trust, should be subject to a six year limitation period.

11. The imposition of limitation periods should not displace the rules of equity which permit the refusal of equitable relief on the grounds of laches or acquiescence.

12. The present scheme respecting actions on judgments should be retained.

13. Orders should be included in the definition of judgments.

14. Actions on foreign judgments should be subject to a six year limitation period.

15. All other actions should be subject to a six year limitation period.

III. APPROPRIATE PERIODS - PROPERTY ACTIONS

A. General

The present Limitation of Actions Act is to a large extent a consolidation of the earlier English limitation statutes inherited by Saskatchewan. For this reason the Saskatchewan statute shares the English preoccupation with real property. The striking feature of this transplant is the almost complete disregard of the predominant position of the Torrens system of land registration. This has created complex problems. It seems that some provisions of the Limitation of Actions Act have lost their effect. In some cases the interplay between the limitations law and land titles law have led to a "state of limbo" in which one party has possession of the land but cannot obtain title, while the other has title but cannot obtain possession.

B. Actions to Recover Land - The Present State of the Law

Under the English system of land law, title to land depended not so much upon ownership, but upon possession. Underlying this was the recognition that possession of land over a long period of time should not be disturbed. The Saskatchewan Limitation of Actions Act reflects this philosophy. Section 18 provides a ten year limitation period within which an action to recover land must be brought. Section 46 provides:

> At the determination of the period limited by this Act, to any person for taking proceedings to recover any land, rent charge or money charged on land, the right

> and title of such person to the land, or rent charge or the recovery of the money out of the land is extinguished.

This extinguished the owner's title to the property. It did not, however, act as a conveyance of the title. No transfer was necessary under English real property law. The title of the person in possession was not derived from the former owner, but from the very fact of possession:

> Whenever you find a person in possession of property, that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it.[75]

In 1913, The Land Titles Act was amended by the addition of a provision[76] which now appears as section 71:

> 71(1) Every certificate of title shall be void as against the title of any person adversely in actual occupation of and rightly entitled to the land at the time when the land was brought under this Act.
>
> (2) After land has been brought under this Act no right, title or interest adverse to or in derogation of the title or of the right to possession of the registered owner shall be acquired, or be held to have been acquired since December 19, 1913, by the possession of another, and the right of the registered owner to make an entry or to bring an action or suit to recover the land of which he is such registered owner shall not be held to be or to have been impaired or affected by any such possession since the said date.

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75 Cheshire's Modern Law of Real Property ed. E.H. Burn, 11th ed., London: Butterworths, 1972, 891.

76 An Act to amend The Land Titles Act, S.S. 1913, c.30, s.6.

The Limitation of Actions Act provisions relating to the recovery of land are specifically made subject to the provisions of The Land Titles Act.[77] Thus, title to land brought under the land titles system can no longer be acquired by adverse possession, and the provisions of the limitations statute are of no effect. The limitation provision will still apply to land that has not been brought within the land titles system.

Actions for recovery of land by a vendor or for cancellation of the agreement are governed by a ten year limitation period. It has been argued that section 71 of The Land Titles Act was intended to govern only where title is claimed by adverse possession, and not where the action relates to an agreement for sale or mortgage.[78] This is evidenced by the fact that, unlike the general limitation provision for the recovery of land, the provisions respecting agreements for sale and mortgages are not made subject to The Land Titles Act.[79] This argument was accepted by the Court of Queen's Bench in In re Scheidt.[80]

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77 Section 17 of the Act provides:
> This Part [Part II, which relates to proceedings to recover land] is subject to The Land Titles Act.

No such provision exists in respect of Part V (Agreement for the Sale of Land).

78 See D.A. Schmeiser, "Prescription under the Saskatchewan Land Titles Act" (1966), 31 Sask. Bar Rev. 54.

79 Supra, note 77.

80 Unreported judgment reproduced in (1966), 31 Sask. Bar Rev. 54, at 59.

The decision has not been accepted by other courts. In Turner v. Waterman[81] it was decided that section 71 of The Land Titles Act applies not only to a squatter or trespasser, but also to a defaulting purchaser under an agreement for sale. But quite apart from section 71, the court found that "the doctrine of title by prescription is inconsistent with indefeasibility of title accorded, by section 207 [now s.213] of The Land Titles Act, 1960, to the registered owner and cannot prevail".[82]

Subsection 213(1) provides:

> 213(1) Every certificate of title and duplicate certificate granted under this Act shall, except:
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> (a) in case of fraud wherein the owner has participated or colluded; and
>
> (b) as against any person claiming under a prior certificate of title granted under this Act in respect to the same land; and
>
> (c) so far as regards any portion of the land by wrong description of boundaries or parcels included in the certificate of title;
>
> be conclusive evidence, so long as the same remains in force and uncancelled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under this Act.

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81 (1965), 53 W.W.R. 595 (Sask. Q.B.).

82 Ibid., at 603.

The certificate of title is conclusive evidence in "all courts" and against "all persons" that the registered owner has title to the land. The Court of Appeal in Montreal Trust Company v. Murphy[83] agreed with the analysis in Turner v. Waterman:

> The title of the registered owner must under our Land Titles Act remain intact and indefeasible. It therefore cannot be extinguished by effluxion of time. The Land Titles Act being a particular enactment dealing with land must override the general enactment of The Limitation of Actions Act.[84]

Thus, section 46 of The Limitation of Actions Act cannot operate so as to extinguish the title of the vendor. But can the vendor proceed to cancel the agreement for sale or otherwise regain possession of the land? A reading of the limitation statute suggests that he cannot. The general effect of a limitation period is to bar the remedy, not the right. Although the vendor will not lose title, he will not be able to regain possession. The purchaser, on the other hand, does have possession but cannot gain title by virtue of possession alone.

The purchaser can, however, break this circularity simply by tendering the purchase price and calling for title. The Saskatchewan Court of Appeal in Jacob Estate v. Nieth Estate[85] decided that the ten year limitation period governing actions by purchasers set out in section 36 does not start running until the full purchase price is tendered (rather than the date when the

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83 (1966), 58 W.W.R. 430 (Sask. C.A.).

84 Ibid., at 435.

85 (1984), 31 Sask. R. 70.

last payment is due under the agreement).[86] Nor does the limitation period apply once the full purchase price is paid, because in such a case the vendor is held to be a trustee.[87] It would appear, therefore, that section 36 will only apply where there has been a tender of the full purchase price, but that tender has been refused. In such a case, a second tender after the expiration of the limitation period will not be effective, and the circularity can only be broken by negotiation between the parties.

The position in respect of mortgages is different. Section 33 provides that a mortgagor has ten years within which to commence action to redeem the mortgage where the mortgagee has taken possession of the property. Under section 34, a mortgagee has ten years within which to commence foreclosure or sale proceedings. Again, the principle underlying these provisions is the English notion of possession as a good root of title. The expiration of the limitation period will extinguish the title or interest of the claimant; it will prevent the mortgagee from foreclosing where the mortgagor is in possession, and will

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86 Subsection 36(1) provides, inter alia:

> No purchaser of land and no person claiming through him shall bring an action in respect of the agreement for the sale thereof, but:
>
> (a) within ten years after the right to bring the action first accrued to the purchaser...

87 O'Dell v. Hastie (1968), 63 W.W.R. 632 (Sask. Q.B.); Bell v. Guaranty Trust Company of Canada, [1984] 2 W.W.R. 348 (Sask. C.A.).

prevent the mortgagor from redeeming where the mortgagee is in possession. This unchallenged possession therefore gives rise to a good title.

This system does not translate easily into the Torrens system. The mortgagor under the Torrens System retains title to the land: the mortgagee merely obtains a charge on the property. Where the mortgagor is in possession and the ten year limitation period governing foreclosure actions has expired, the mortgagor can simply apply to have the mortgage removed from title.[88] However, where the mortgagee is in possession and the period for redemption has expired, the same procedure does not apply. The mortgagee does not have title to the land. It is no longer meaningful to refer to the mortgagor's action for redemption. The Land Titles mortgage does not involve a transfer of title: the mortgagor does not need to bring an action for reconveyance (redemption) because the mortgagor retains legal title. Although there are no cases on point, it is likely that a court would apply subsection 71(2) and hold that the mortgagor is entitled to recover the land. The limitation period governing redemption will only apply to cases where the mortgagor has given an outright transfer to the mortgagee, but there are collateral facts to establish that it was only intended as security. Thus, except in the exceptional case where an outright transfer was intended as security, the ten year period for redemption actions is a dead letter.

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[88] See In Re Hadwin (1954), 12 W.W.R. (N.S.) 414 (Sask. C.A.).

This state of law is intolerable. The limitations law and land titles law must be harmonized. In particular, the law must be changed so that title to land can never be "in a state of limbo".

C. Title by Adverse Possession

It has been said that the idea of title by adverse possession is inconsistent with the philosophy of a Torrens system.[89] Although the Commission does not share the view[90] that the Torrens system compels the abolition of title by adverse possession,[91] it is nevertheless of the opinion that the present rule should be retained.

The issue is whether the registered owner of the land should be entitled to rely upon the certificate of title against those raising possessory claims against him. The case against such reliance is made out as follows:

> Misunderstandings have sometimes arisen from an unwarranted belief that title deeds are sacrosanct documents, whereas the truth is that neither a

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89 See J.S. Williams, "Title by Limitation in a Registered Conveyancing System" (1968), 6 Alta. L. Rev. 67.

90 Thomas Mapp, "Torrens' Elusive Title", Edmonton: Alberta Law Review, 1978 at 173 states: "Whether or not a jurisdiction should permit one in adverse possession of land to acquire a right to divest the registered ownership is an important socio-economic question. It is the author's opinion, however, that a decision should not be influenced by the fact that a jurisdiction has a Torrens system."

91 It should be noted that the Alberta Land Titles Act, R.S.A. 1980, c.L-5, s.74 permits title to be obtained by adverse possession. The principle of indefeasibility is not endangered because third party purchasers for value are not prejudiced by an unregistered possessory title.

> conveyance nor a land certificate retains its value if the landowner is so lax or so indifferent as to lose physical control of his land.[92]

The duplicate certificate of title may not be a sacrosanct document, but it has altered, subtly, the way people think about land. The registered owner of the land does indeed possess a form of control over it. The person in whose name the land is registered controls the ability to alienate the land. The squatter, while in possession, will know that he lacks a major incident of ownership. Mere physical possession is of less relevance than it was in the past. The Torrens system has eroded the importance of possession. Registration is the key to ownership.

Accordingly, the Commission proposes that there should be no limitation period in respect of actions for recovery of land where an owner has been dispossessed in circumstances amounting to trespass.

D. Actions Relating to Mortgages

Section 12 of The Limitation of Actions Act provides that an action to recover any sum of money secured by a mortgage or otherwise charged upon or payable out of land must be brought within ten years. It will be recalled that section 33 creates a ten year period within which a mortgagor must bring an action to

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92 M.J. Goodman, "Adverse Possession of Land - Morality and Motive" (1970), 33 Mod. L. Rev. 281, at 282.

redeem the mortgage (where the mortgagee is in possession), while section 34 creates a ten year period within which a mortgagee must bring an action for foreclosure or sale.

The Law Reform Commission of British Columbia concluded that a six year limitation is more appropriate:

> Some arguments can be made in favour of longer limitation period. Historically, limitations law has favoured the secured creditor with respect to the enforcement of his security, and that position should not be lightly disturbed. It may also be argued that the creditor who has taken the trouble to ensure that moneys owing to him are secured against something of value deserves greater protection than the creditor who has not safeguarded his position in that fashion. It is felt, however, that the desirability of a six-year limitation period outweighs those considerations....Is there any logical reason why there should be a longer limitation period merely because security is given for the performance of that contract? This security, and the remedies attached to it, are merely ancillary to the personal debt, and logic suggests that in enforcing his security, the creditor should be governed by the same limitation period which applies to the personal covenant to repay the loan.[93]

The Commission is of the opinion that the same limitation period should apply to all charges, whether on land or on personal property, and that the period should be six years - the same as that for an action for recovery on an ordinary debt.

The most common scenario is that of the mortgagor in possession. This presents no problem: the mortgagor should continue to have the power to apply to the court to have the mortgage removed from the title after the expiration of the limitation period.

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[93] B.C. Report, at 53-54.

The question of the mortgagee in possession is more difficult. This is a less common situation: it will occur where the mortgagee has taken possession of the land but has not completed proceedings for foreclosure or sale.

The New South Wales Commission took the position that the mortgagee in possession should lose all rights in the land after the expiration of the period for foreclosure or sale.[94] It reasoned that once the mortgagee can no longer sue on the covenant, all rights should be lost in respect of the security. The British Columbia Law Reform Commission took a different view. It thought that the time period for foreclosure or sale should not run against the mortgagee in possession. The mortgagee will usually take possession as a means of enforcing its security and the limitations statute should "accord with the realities of the mortgagee's position".[95]

The Commission proposes that the more pragmatic position of the British Columbia Commission be adopted. The dispossessed mortgagor may have disappeared. If that is so, the effect will be that the title is placed in limbo. The mortgagee has possession of the land, but has no way of acquiring title. In such a case, it is better to permit the mortgagee in possession to obtain title to the land.

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94 N.S.W. Report, at para. 214 and 215.

95 B.C. Report, at 56.

E. Actions Relating to Agreements for Sale

It is common in Saskatchewan to use agreements for sale as a method of financing the sale of land. In England and Ontario this use of an agreement for sale is unknown: a financing arrangement between the vendor and purchaser would be accomplished by a sale and mortgage back. This use of the agreement for sale may have developed because of the Torrens system's greater emphasis on title. The vendor is reluctant to surrender his status as a registered owner until the full purchase price is paid. The agreement for sale was also an attractive sales and financing vehicle because it permitted neighbours to agree on a fairly informal basis (not requiring deeds, mortgages, lawyers or banks). The actual transfer is deferred until the purchase price is paid.

The Commission has examined a number of alternatives for reform. At a minimum, the statute must ensure that title to land is not placed in limbo. The Commission has concluded that there are two feasible alternatives. First, the statute could provide that no limitation period apply to actions under agreements for sale. The vendor can at any time bring an action for cancellation of the agreement and regain possession of the land. The purchaser can, at any time before cancellation proceedings are concluded, tender the full purchase price and have the land transferred to him.[96]

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96 This alternative was canvassed in the Commission's Tentative Proposals for Changes in Limitations Legislation - Part I: The Effect of Limitations on Title to Real Property (1981).

This alternative is deficient in one respect. The informality of many agreements for sale is just the sort of situation that limitation periods are intended to cure. The purchaser will have been in possession of the land for many years. The vendor may have disappeared. Or the vendor or purchaser, or both, may have died. The terms of the agreement may be contained in a series of letters, some of which are missing. There may be incomplete records of how much was paid under the agreement. Limitation rules are designed to eliminate stale claims of this sort.

The second alternative is to permit the purchaser in possession to have title transferred to him after the expiration of the vendor's limitation period. The vendor under the agreement for sale would then be in the same position as the vendor (mortgagee) under a sale and mortgage back. In effect, the expiration of the limitation period would operate so as to estop the vendor from claiming that the purchase price had not been paid. The vendor would merely hold the title in trust for the purchaser.

This alternative is also less than ideal. In Saskatchewan the agreement for sale is regarded as something more than a mere security device in the form of a mortgage. Again, the reason is that many owners of land regard retention of title as their legal control over the land. Prompt action to oust the defaulting purchaser is thought to be unnecessary since the vendor possesses the key to any dealing with the land.

Should this second alternative be adopted, an amendment to The Land Titles Act would be required to permit the court to extinguish the title of the vendor and transfer it to the purchaser. This would in no way affect the principle of indefeasibility. A bona fide purchaser would still be entitled to rely upon the registry. The provision would only operate between the parties to the original transaction.

The first alternative likely is more in harmony with the expectations of those who enter into agreements for sale. The limitations statute should no longer provide for the extinguishment of title, but should provide that actions by vendors for cancellation of an agreement for sale and actions by purchasers to obtain title to land under an agreement for sale not be subject to a limitation period. The Commission is also of the view that the amount required to be paid by the purchaser in order to obtain title to the land should be limited to the principal owing together with interest accruing in the six year period following the date when the last payment under the agreement for sale became due. The purpose of this limitation is to prevent a vendor who has neglected his rights for many years from claiming a prohibitive accumulation of compound interest from the purchaser.

A state of limbo may still be possible under this proposal in cases where the vendor has disappeared. The purchaser will be unable to tender the purchase price and call for title. The Commission proposes that this problem be remedied by an amendment to The Land Titles Act permitting the purchaser to pay into court the amount owing under the agreement for sale, and then obtaining title to the land.[97]

F. Actions to Recover Rent

The Limitation of Actions Act draws a distinction between actions to recover a rent charge and actions to recover arrears of rent. In the former instance, a ten year limitation period is imposed,[98] while in the latter a six year limitation period is created.[99]

The rent charge is not common today. Ordinary rent (rent-service) originates out of a landlord-tenant relationship. A rent charge lacks this characteristic. It is a real property version of an annuity: a sum of money is made payable out of land, which is secured by a right of distress. Accordingly, it operates as a charge against the land.

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97 See the Commission's Tentative Proposals for Changes in Limitations Legislation - Part I: The Effect of Limitations on Title to Real Property (1981), at 17-18 for draft legislation that would implement this proposal.

98 Section 12.

99 Section 14.

The Commission has proposed that a six year limitation period operate in respect of actions for debt and equally in respect of actions against land upon which the debt has been charged. No distinction would therefore need to be made between rent-service and rent-charge. Both would be subject to a six year period.

G. Actions Relating to Personal Property

In Saskatchewan a ten year period operates in respect of mortgages of personal property. A mortgagee has ten years within which to commence proceedings for foreclosure or sale where the mortgagor is in possession. The mortgagor has ten years with which to redeem the mortgage where the mortgagee is in possession. In 1933, provisions were added in respect of conditional sales agreements.[100] The seller has ten years with which to commence proceedings for sale or recovery of the goods.

In both the case of a chattel mortgage and of a conditional sales agreement, an action for the debt is barred after six years, yet the mortgagee or seller may have recourse against the goods until the ten year period has expired. The Commission is of the view that the action in respect of personal property should be subject to a six year period. The interest in the property is taken merely as collateral security. The property interest should be extinguished when the action for the debt is barred.

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[100] S.S. 1933, c.17; now sections 39-41.

The introduction of the six year period creates a uniform period in respect of most commercial matters. Whether it is an action to recover a debt, or an action to proceed against real or personal property given as security, a six year period will generally apply. This uniformity will enhance commercial certainty. Modern financing arrangements may involve a number of related transactions. The present law may fracture such arrangements where some limitation periods have expired while others have not.

The introduction of The Personal Property Security Act[101] in 1981 has rendered obsolete the chattel mortgage/conditional sales distinction. The statute should instead adopt the terminology of "debtor", "secured party" and "security agreement".

It will be recalled that section 46 of the present Act provides that the right and title to the land is extinguished once the limitation period has expired. This provision does not apply, however, to personal property. It has been suggested that this means that merely the remedy is extinguished: the right (in this case, the title to the goods) is not. There is some question whether this accurately reflects the law. J.E. Cote points out that English law does not recognize "title" in an absolute sense:

> ..."ownership" of a chattel is the sum of the rights possessed with respect to it, that these rights consist of, or are protected by, the ability successfully to

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[101] R.S.S. 1978, c.P-6.1.

> bring a suit in tort in defence of the chattel, and when those rights in tort are gone "the right has in point of law ceased to exist".[102]

If the right to the property is not extinguished, then what is the result? Can the "true owner" attempt to regain possession by exercising a self-help remedy? And if the person in possession does not own the goods, then he will not be able to transfer good title. Again a "state of limbo" will result. The "true owner" will not be able to obtain possession of the goods, but the possessor will not be able to transfer good title to another. This result is unacceptable. Section 46 should be expanded to provide that upon the expiry of the limitation period, the right or title to personal property is extingished.[103]

One further matter must be addressed. There are certain situations in which successive dealings with personal property can give the plaintiff a number of possible actions. For instance, if A's chattel is converted first by B and then by C, A will be able to sue C for the subsequent conversion even if his remedy against B is statute-barred. This is a serious deficiency. There is little protection afforded by the common law to the bona fide purchaser. He should at very least be entitled to rely upon the passage of time to ensure that his ownership will not be challenged. The Commission therefore

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[102] "Prescription of Title to Chattels" (1969), 7 Alta. L. Rev. 93, at 99.

[103] The question of extinguishment of right will be discussed at greater length at pages 105-111 of this report.

proposes that the six year limitation period run from the date of the original conversion notwithstanding that further conversions may take place.

H. Non-Security Interests in Land

The intricate English system, with its various estates and relative interests, does not translate easily into a Torrens system, with its notion of absolute title. There are a number of interests which can be registered against the land, but which are less than an absolute title to the land. Actions by tenants for possession of land, actions by holders of a life interest, actions in respect of incorporeal hereditaments, actions to enforce restrictive covenants, and actions for possession of land upon the exercise of the possibility of reverter or right of re-entry for a condition broken are all actions relating to interests in land. The interest may be protected by way of caveat registered against title. Section 71 of The Land Titles Act does not apply, since the holder of such an interest is not a "registered owner". Thus, the limitations statute will govern.

1. Actions by Tenants for Possession

The Commission has recommended that there should be no limitation period in respect of an action by an owner for possession of land in circumstances amounting to trespass. This should also apply to actions for possession of land against

strangers holding adversely against the tenant. It should not, however, apply to actions by tenants for possession against the landlord. In such a case a six year period should apply.

2. Life Interests

It is still possible to create a life interest under the Torrens system. The title is not transferred to the life tenant. The title may be transferred into the name of the remainderman, in which case the life tenant should protect his interest by filing a caveat. Or if the life interest is created by will, the executors may retain title to the land until the death of the life tenant.

The Commission shares the view of the British Columbia Law Reform Commission that successive interests in land should, so far as possible, be treated in a similar fashion.[104] The registry system is such that only one person can be registered as "owner". That person is, by virtue of The Land Titles Act, protected from claims of title by adverse possession. The other "owners" - i.e., the life tenant and the remainderman - should be in a similar position. The limitations statute should provide that the right of a life tenant or remainderman to bring an action for possession of land is not subject to a limitation period.

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[104] B.C. Report, at 60-61.

3. Possibilities of Reverter and Rights of Entry for Conditions Broken

Successive interests in land at common law were created when determinable estates and conditional estates were granted. In the former, the determinable estate ceased immediately when the events described in the words of limitation occurred and reverted back to the grantor. In the latter, the estate is subject to a condition subsequent so that if the condition is breached, the estate could be determined if a right to enter was exercise.

Such interests are not common today, but it is still possible to create such interests and protect them by caveat. The British Columbia Law Reform Commission stated:

> Having regard to the mechanics of the land registry system, we feel there is some advantage in having these interests subject to a limitation period. The effect of a limitation period would be to keep the land marketable and thus support the purpose of the land registry system. It would mean that those dealing with the land would only have to examine events during some specified period in order to determine whether the condition has been broken.[105]

The Commission agrees. A six year limitation period should be imposed on such actions.

A person who has taken steps to assert his ownership (i.e., taken possession of the land) but has not, however, taken steps to have the title transferred to him should not be affected by the limitation period.

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[105] B.C. Report, at 61-62.

4. Easements, Restrictive Covenants and Profits-a-Prendre

Easements, restrictive covenants, and profits-a-prendre are interests in land that do not amount to interests in possession. The Commission is of the opinion that such actions should not be limited by time. Unlike the determinable or conditional estate, the easement, restrictive covenant or profit-a-prendre does not require a search to see if a contingency has occurred. It is entirely reasonable to allow the interest-holder to rely upon his registration in the land titles system.

I. Summary of Proposals

1. Actions for recovery of land where an owner has been dispossessed in circumstances amounting to trespass should not be subject to a limitation period (i.e., the acquisition of title to land by adverse possession should not be possible).

2. Actions by secured parties to realize upon a mortgage or other security interest should be subject to a six year limitation period.

3. No limitation period should apply in respect of an action to realize on collateral where the secured party is in possession of the collateral.

4. Actions by debtors not in possession of property subject to a security interest to redeem the property should be subject to a six year limitation period.

5. Actions by a purchaser under an agreement for sale of land to obtain title to the land should not be subject to a limitation period.

6. Actions for cancellation of an agreement for sale should not be subject to a limitation period.

7. The amount required to be paid by the purchaser in order to obtain title under an agreement for sale of land should be limited to the principal owing together with interest accruing in the six year period following the date when the last payment under the agreement for sale became due.

8. The Land Titles Act should be amended so as to allow a purchaser to pay into court the balance of the purchase price where the vendor cannot be located.

9. The right and title to personal property should be extinguished upon the expiry of the limitation period.

10. The limitation period for actions for conversion should begin to run from the date of the original conversion notwithstanding that further conversions may subsequently occur.

11. Actions by a tenant against his landlord for possession of land should be subject to a six year period.

12. An action by a life tenant or remainderman for possession of land should not be subject to a limitation period.

13. Actions based on a right to enter for a condition broken or a possibility of reverter should be subject to a six year limitation period.

14. No limitation period should apply to actions for the enforcement of easements, restrictive covenants, and profits-a-prendre.

IV. THE RUNNING OF TIME: POSTPONEMENT, SUSPENSION AND EXTENSION

A. The Hidden Cause of Action

1. The Problem Revealed

Under the present law, time begins to run as soon as all the elements necessary for the civil claim exist. In many cases this will not present a problem. The victim will usually know of the wrong. If the wrongdoer fraudulently conceals the wrong, it is of no moment: the statute provides that when the existence of a cause of action has been concealed by the fraud of a wrongdoer, the cause of action is deemed to have arisen when the fraud was first known or discovered.[106]

The rule will, however, operate harshly where latent disease or injury is sustained. There is a form of concealment, but it is not a fraudulent concealment that would postpone the running of the limitation period. A classic example of this harshness came to light in the noted House of Lords decision of Cartledge v. E. Jopling & Sons, Ltd.[107] One of the plaintiffs in that case had been employed in a factory since 1939. From that time until 1950, inadequate ventilation had existed. This was remedied after 1950. The plaintiff contracted pneumonoconiosis, an industrial disease that gives no indication of its presence in the early stages. The plaintiff later discovered that he had the disease, but by this time the limitation period had expired.

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106 Section 4.

107 [1963] 1 All E.R. 341.

The House of Lords held that the cause of action occurred when the damage had been suffered, whether or not the plaintiff knew of the damage. Lord Reid pointed out the artificial nature of this rule:

> There seems little if any practical difference between causing damage which only occurs at a latter date and causing damage which can only be discovered at a later date. If a defendant has to pay in one case why should he not have to pay in the other case? One thing at least is clear. The fact that the present law requires us to dismiss this appeal shows that some amendment of the law is urgently necessary.[108]

This decision has spawned a number of legislative and judicial initiatives which have thoroughly confused the law in Canada.

2. The Aftermath in England

Legislation followed quickly. The Limitation Act, 1963[109] substantially implemented the recommendations of the Edmund Davies Committee. The Act was often criticized for its obscure drafting. Lord Reid indicated that "this Act has a strong claim to the distinction of being the worst drafted Act on the statute

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[108] Ibid., at 344.

[109] c.47.

book".[110] The English Law Reform Committee re-examined the question. Their recommendations were adopted in the Limitations Act, 1975.[111] These provisions are now incorporated as sections 11 to 14 and 33 of the Limitations Act, 1980.[112] The provisions are restricted to personal injury actions. The time period is three years and begins to run from the date of knowledge of the injured person.[113] The "date of knowledge" is defined as the date on which the person had knowledge of the following facts:

(a) that the injury in question was significant; and

(b) that the injury in question was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance, or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.[114]

The plaintiff's ignorance that he had a good cause of action does not postpone the running of the limitation period. In determining whether the injury is significant, the test is partly objective and partly subjective:

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110 Central Asbestos Co. Ltd. v. Dodd, [1972] 2 All E.R. 1138 (H.L.).

111 c.54.

112 c.58.

113 Subsection 11(4).

114 Subsection 14(1).

> Taking that plaintiff, with that plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages?[115]

The plaintiff's knowledge is to include facts observable by him as well as facts that would be ascertainable if reasonable steps had been taken to seek appropriate legal advice.

In addition to this rather complex scheme, there is a general judicial discretion to override the limitation periods. Even if the plaintiff is barred under sections 11 or 12, the court may, if it is equitable to do so, order that sections 11 and 12 not apply (thereby depriving the defendant of his limitation defence). In exercising its discretion, the court is directed to have regard to all the circumstances of the case and in particular to:

> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

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115 McCafferty v. Metropolitan Police District Receiver, [1977] 2 All E.R. 756, at 775 (H.L.).

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.[116]

But the enactment of this legislation was by no means an end to the matter. The Act only applies to actions for personal injuries. It did not cover latent defects in buildings, such as structural damage that is not discovered for a number of years. If the cause of action accrued when damage occurred then clearly the action was barred. Judges, however, began to tinker with the date of accrual of the cause of action. Cartlege v. E. Jopling & Sons, Ltd. was binding authority, but it could be restricted to actions for personal injuries (and had in any case been superseded by legislation). In Sparham-Souter v. Town & Country Developments (Essex) Ltd. the Court of Appeal departed from earlier authority. Lord Denning had this to say:

> But now, having thought it over time and again - and been converted by my brethern - I have come to the conclusion that, when building work is badly done - and covered up - the cause of action does not accrue, and time does not run until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it.[117]

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116 Section 33.

117 [1976] 2 All E.R. 65, at 69.

It seemed that this view would prevail. In 1977, the House of Lords in Anns v. Merton London Borough[118] skirted around the question. Although they did not expressly approve of this new development, they certainly did not reject it. However, in 1982 the House of Lords in Pirelli General Cable Works Ltd. v. Oscar Faber & Partners[119] foreclosed this avenue. The House of Lords was unconvinced by the distinction between personal injuries and damage to property drawn in the Sparham-Souter case. The Cartledge case applied. Only Parliament could alter it.

3. The Position in Canada

There was, in Canada, long-standing authority that a cause of action in contract accrues when the breach occurs.[120] Damage was not an essential ingredient of the action. There also appeared to be an acceptance of the principle that an action in tort is not complete until damage has occurred.

Then came Sparham-Souter. Perhaps buoyed by the House of Lords' tacit acceptance of the new doctrine in Anns v. Merton London Borough, Canadian courts welcomed the case. The appellate

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118 [1977] 2 All E.R. 492.

119 [1983] 1 All E.R. 65.

120 See Schwebel v. Telekes (1967), 61 D.L.R. (3d) 470 (Ont. C.A.).

courts of Ontario,[121] British Columbia[122] and New Brunswick[123] adopted the new rule: in actions for work negligently performed and covered up the cause of action does not accrue until the plaintiff discovers the damage or reasonably ought to have discovered it.

The Alberta Court of Appeal came to a different conclusion. Laycraft, J.A. in Costigan v. Ruzicka noted that:

> With this flourishing growth of the new doctrine in Canada, its English parent plant was abruptly weeded out. In Pirelli Gen. Cable Works Ltd. v. Oscar Farber & Partners...the House of Lords overruled Sparham-Souter and re-established the rule that a cause of action in tort for negligence in a building case accrues when the damage occurs whether or not it was discoverable by reasonable diligence.[124]

The Court agreed with the Pirelli decision. Any change to the law would require legislation.

The matter was finally settled by the Supreme Court of Canada in Kamloops v. Nielsen.[125] The Court rejected Pirelli and adopted Sparham-Souter, at least so far as physical damage in building cases is concerned. The Court did not comment whether the same reasoning would hold true where personal injury claims are involved. It did not purport to reject Cartledge.

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121 Robert Simpson Co. Ltd. v. Foundation Co. of Canada Ltd. (1982), 36 O.R. (2d) 97.

122 Kamloops v. Nielsen, [1982] 1 W.W.R. 461.

123 N.B. Tel. Co. v. John Maryon Int. Ltd. (1982) 24 C.C.L.T. 146.

124 [1984] 6 W.W.R. 1.

125 (1984), 10 D.L.R. (4th) 641.

Assuming therefore that the Cartledge decision is still good law, the summary of Mr. Justice Cory in Robert Simpson Co. Ltd. v. Foundations Co. of Canada Ltd. represents an accurate statement of the law:

> Let us assume that the goal which the plaintiff seeks, the golden fleece which he desires to obtain is a trial of his action on the merits. Like the heroes of old, he must overcome obstacles to achieve his aim. Some will be insurmountable; others may be circumnavigated or overcome. The following may be of some use as a navigational chart when sailing close to the rocky reefs of the Limitations Act.
>
> 1. In an action for breach of contract between parties to a contract the limitation period runs from the date of the breach.
>
> 2. Schwebel v. Telekes...provides that where the plaintiff's claim arises out of a contract for personal services requiring the defendant to exercise his special skill and knowledge arising out of the defendant's calling then in those circumstances the cause of action arises at the moment of the breach of the contract or the negligent act.
>
> 3. In the case of a personal injury not arising out of a contractual relationship, the cause of action arises when the injured party suffers the damage.
>
> 4. Where there is no contractual relationship between the parties and the plaintiff's claim is based upon work negligently performed and covered up the cause of action does not accrue, and time does not begin to run until such time as the plaintiff discovers the damage or reasonably ought to have discovered the damage.
>
> 5. Where there is no contractual relationship between the parties and the negligent act was committed at a time outside the limitation period but the damages were not occasioned until a much later date the cause of action accrues when the damages were occasioned.

> 6. From this point on the chart is unreliable for the waters about the reef and the currents are conflicting and unpredictable. [The difficulty is where there is a breach of contract that also constitutes a breach of a duty of care owed to the plaintiff. It is not clearly established whether the limitation period for negligent breach of a contractual duty will govern, or whether the plaintiff may elect to sue in tort rather than in contract.][126]

A further development has arisen in this rapidly evolving area of law. The Ontario Court of Appeal in Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd.[127] overruled Schwebel v. Telekes. The court found that the duty of care imposed upon professionals may be the subject of concurrent actions in contract and tort (unless the contract specifically precludes the tort action). The court also suggests that the rule that time does not begin to run until there is a reasonable opportunity to discover the facts applies to all actions based on breach of duty. whether based on contract or tort. This is, of course, a significant departure from the law outlined by Mr. Justice Cory.

A number of provinces have enacted legislation. Manitoba was the first province to act.[128] Its legislation was based upon the English Limitations Act, 1963. Further amendments were introduced in 1980.[129] An application for leave to commence an

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126 (1982), 36 O.R. (2d) 97, at 108-9.

127 (1985), 51 O.R. (2d) 385.

128 S.M. 1966-67, c.32.

129 S.M. 1980, c.28.

action after a limitation period has expired must be brought within twelve months from "the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based".[130] Amendments in 1980 confirmed that a subjective standard of knowledge was contemplated: i.e., the appreciation of what is a material fact should depend on the "intelligence, education and experience" of the individual.[131]

Nova Scotia, on the other hand, has opted for judicial discretion.[132] The legislation substantially adopts section 33 of the English Limitations Act, 1980. The court may exercise its discretion and permit the plaintiff to commence an otherwise time-barred action if it is equitable to do so. The court is directed to consider the identical list of factors contained in subsection 33(3) of the English statute. Unlike the English Act, the provision is not restricted to actions for personal injuries but extends to most personal actions, and the discretion can only be exercised within four years of the expiration of the limitation period.

Finally, the British Columbia Limitations Act provides that:

> The running of time with respect to the limitation periods fixed by this Act for an action...is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that

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130 R.S.M. 1970, c.L-150, s.15.

131 R.S.M. 1970, c.L-150, s.21(3); as amended S.M. 1980, c.28.

132 S.N.S. 1982, c.33, s.2.

> a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
>
> (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.[133]

The drafting of clause (j) is obscure. Time begins to run when the person "ought...to be able to bring an action". Perhaps it was intended to mean that the time period does not run until the person would regard the injury as being sufficiently serious to justify bringing an action. But in referring to "in his own interests and taking his circumstances into account", the statute might have been intended to cover problems such as a person's delay in bringing an action against an employer for fear of losing his job.

4. The Proposed Provision

It is apparent that there are a number of different formulae, all of which are directed to the problem of the hidden cause of action. There are two basic techniques. The first is to delay the running of the period until the plaintiff has knowledge of the facts on which his action depends. The second

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133 R.S.B.C. 1979, c.236, s.6.

is to give the court a discretion to relieve the plaintiff from the effects of an expired limitation period where it is equitable to do so. British Columbia and Manitoba have adopted the first technique, Nova Scotia the second. England has adopted both. The common law is moving towards the first, though it is not yet certain whether it is restricted to tort actions, or whether it applies also to a breach of duty of care arising out of contract.

The Commission proposes that the first technique be adopted. The choice might be said to uphold certainty over flexibility. The Commission thinks, however, that such flexibility is not needed. The problem with the present law is that time begins to run before the plaintiff knows of his injury. That can be cured by delaying the running of time until that knowledge is obtained. So long as the general law of limitations is premised upon fixed time periods, the problem of the hidden cause of action should be addressed by delaying the running of time. The Commission gave serious consideration to whether the general limitations law should in fact be so premised. It considered a scheme under which all time periods were discretionary, but ultimately rejected this alternative.

The Uniform Law Conference has accepted the proposals of the Alberta Institute of Law Research and Reform.[134] Subsection 13(2) of the Uniform Act provides that:

> The beginning of the limitation period for an action is postponed until the plaintiff knows or, in all circumstances of the case, he ought to know:

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134 Working Paper - Limitation of Actions (1977), at 56-61.

(a) the identity of the defendant; and

(b) the facts upon which his action is founded.

This provision is narrowly drafted. Time begins to run as soon as the plaintiff becomes aware of the damage or injury. This will hold true even though the injury appeared to be trivial, but was later (after the expiration of the limitation period) discovered to be more serious.

The Commission is of the opinion that time should not run until the person knows or ought to have known that the injury was significant. Determining what exactly constitutes a significant injury presents a problem. A partly subjective test is used in England. Time begins to run when the person "would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment".[135] In Manitoba a subjective test of knowledge is applied, and the test is whether "an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions".[136] In British Columbia a similar (though perhaps wider) formulation is used.

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135 Limitation Act, 1980, c.58, s.14(2).

136 S.M. 1980, c.28, s.3.

The Commission is not satisfied with the approach taken by Manitoba and British Columbia. The personal fears, desires and attitude of the plaintiff should not be taken into account. For this reason the Commission proposes that the English approach be integrated into the formulation put forward by the Uniformity Commissioners. Time would run when the plaintiff knew or ought to have known:

(a) the identity of the defendant;

(b) the facts upon which the action is founded; and

(c) that the injury suffered was significant.

The English formulation of what constitutes a significant injury should also be adopted with one change: a fully objective standard should be applied. An injury should be considered significant if a person would reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment. P.J. Davies argues that the English formulation is faulty:

> Parliament's intention was that time should begin to run from the point when an injury or disease becomes reasonably serious. But is it not arguable that as against a defendant who does not dispute liability and who has sufficient assets (or insurance cover) to satisfy an award of damages it is almost every cough or sprain that will be sufficiently serious to justify an action? [137]

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137 "Limitations of the Law of Limitations" (1982), 98 L.Q.R. 249, at 257.

The Commission does not accept this argument. The test of reasonableness is used for the purpose of distinguishing the trivial from the serious. It is not reasonable to pursue in a court of law every technical breach of one's rights. A defendant willing to concede liability and able to satisfy a judgment is postulated so that the defendant's legal manoeuvering or his impecuniosity does not enter the calculus. If it were otherwise, the defendant's inability to satisfy a judgment would be sufficient to suspend the running of time. The Commission is of the view that such factors are properly outside the mischief intended to be remedied by the provision.

5. Scope of the Provision

The jurisdictions that have enacted provisions dealing with the hidden cause of action have differed on what types of action should fall within the scope of the provision. England restricts its provision to personal injury actions,[138] Nova Scotia restricts its provision to most personal actions,[139] while Manitoba in 1980 widened its provision to encompass virtually every action.[140] British Columbia[141] restricts the scope of its

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138 Limitation Act, 1980, c.58, s.11(1).

139 Statute of Limitations, R.S.N.S. 1967, c.168, s.2A(a)(a), as amended S.N.S. 1982, c.33.

140 The Limitation of Actions Act, R.S.M. 1970, c.L-150, s.15(1), as amended S.M. 1980, c.28.

141 Limitation Act, R.S.B.C. 1979, c.236, s.6(3).

provision to an action:

(a) for personal injury;

(b) for damage to personal property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the Family Compensation Act; or

(h) for breach of trust not within subsection (1).

The Commission is of the view that the extension provision should apply to actions that are subject to a two year limitation period, other than actions for penalties. In addition, actions based on fraud or deceit, actions where the material facts have been wilfully concealed, and actions for breach of trust other than for fraudulent breach of trust (which is governed by a special postponement provision) should also be within the scope of the extension provision.

B. Absence from the Jurisdiction

Section 49 of The Limitation of Actions Act provides as follows:

> In respect of a cause of action as to which the time for taking proceedings is limited by this Act other than those mentioned in clauses 3(1)(a) and (b), [actions for penalties] if a person is out of the province at the time a cause of action against him arises within the province, the person entitled to the action may bring the same within two years after the

> return of the first mentioned person to the province or within the time otherwise limited by this Act for bringing the action.

This type of provision was first introduced by the Statute of Anne of 1705,[142] which provided that if a defendant is "beyond the seas", time should not run until his return. The provision will only apply where the defendant is outside the jurisdiction at the time the cause of action arises. It will not apply where the defendant is within the jurisdiction, but later leaves.

The Ontario Law Reform Commission thought it unnecessary to include a postponement provision for absence from the jurisdiction for the following reasons:

(1) modern facilities for transport and communication;

(2) the "beyond the seas" notion is hardly applicable in any event to movement from province to province;

(3) an action can be brought against the potential defendant even if he is absent from the jurisdiction;

(4) the provisions in the Rules, by which a person may serve ex juris;

(5) the fact that it is unusual for potential defendants to be outside the province when a cause of action over which the provincial courts have jurisdiction arises (in tort cases it would rarely occur);

(6) the complexities of modern commercial activities;

(7) there are difficulties in determining when a potential defendant has "returned" (he may never have been in the province in the first place);

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142 4 Anne, c.16, s.19.

(8) it is not generally desirable to keep alive causes of action for an indeterminate time.[143]

England, New South Wales and British Columbia have rejected absence from the jurisdiction as a reason for postponing the limitation period. The Commission is of a similar view.

C. Disabilities: Minority and Mental Incapacity

Section 6 of The Limitation of Actions Act provides as follows:

> The running of time with respect to a limitation period to bring an action fixed by this or any other Act is postponed for a person who is entitled to bring such an action for so long as he is an infant or:
>
> (a) he is by reason of mental disorder not competent to manage his affairs or estate; and
>
> (b) he or his estate is not represented by a committee appointed under The Public Trustee Act or The Mentally Disordered Persons Act who:
>
> (i) is aware of the cause of action; and
>
> (ii) has the legal capacity to commence the cause of action on behalf of that person or his estate.

This provision was included in 1983.[144] It replaced earlier sections which provided that a cause of action does not start to run until the person ceased to be under a disability if at the time the cause of action arose that person was under a

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143 Ont. Report, at 95-96.

144 S.S. 1983, c.80, s.13.

disability. It should be noted that this provision, unlike the other postponement provisions of the Act, applies to special limitation periods contained in other statutes.

The present provision makes a distinction between disability attributable to age and disability attributable to mental disorder. In the former, time does not run until the individual attains the age of majority. In the latter, the limitation period runs from the time that there is a committee who is aware of the cause of action and who is legally capable of pursuing the matter. It should also be noted that, unlike the former provision, the postponement operates where the mental disorder occurs after the accrual of the cause of action.

Other jurisdictions have taken a different approach. In 1966 Alberta modified its disability provisions so that it does not apply:

> (a) if the person under disability is a minor in the actual custody of a parent or guardian, or
>
> (b) where the person under disability is a mentally incapacitated person whose affairs are in the custody of a committee or of the Public Trustee.[145]

The Ontario Law Reform Commission agreed with this approach.[146] Manitoba has adopted a different approach. The postponement operates even if the child is in the custody of a parent or guardian, or even if the child is in the custody of a parent or

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145 S.A. 1966, c.49, s.3; now Limitation of Actions Act, R.S.A. 1980, c.L-15, s.59.

146 Ont. Report, at 96-100.

guardian, or the mentally disabled person whose affairs are in the custody of a committee.[147] The British Columbia Law Reform Commission also had difficulty with the Alberta/Ontario position:

> This Commission does not find the approach of the Ontario Law Reform Commission wholly satisfactory on this point, especially regarding the position of minors. We would be loath to see the way open for a parent to seriously impair the rights of a child because he, for any one of a variety of reasons, might be unwilling to prosecute an action on behalf of that child. The position is less serious in the case of a committee who is in a fiduciary relationship to the patient and so may be more easily called to account for his acts or omissions than a parent.[148]

To remedy this, the B.C. Commission recommended that the running of time should be postponed so long as the disability persists, but that the defendant can start the period running by delivering a notice to proceed to the committee, parent, guardian or the Public Trustee. In addition, the Public Trustee would be required to investigate the matter where such a notice was issued.

On balance, the Commission favours the present Saskatchewan position in relation to the mentally disabled person. Where a committee is appointed, it is reasonable to expect that the interests of the mentally disabled person is adequately protected. The same considerations do not apply where a minor is

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147 The Limitation of Actions Act, R.S.M. 1970, c.L-150, s.9(1), as amended S.M. 1980, c.28, s.2. See also Manitoba Law Reform Commission, Report on Limitation of Actions: Time Extensions for Children, Disabled Persons and Others (1979), Report No. 27.

148 B.C. Report, at 70.

involved. There is not a similar fiduciary relationship. For this reason, the Commission is of the opinion that the notice to proceed mechanism is appropriate. The mechanism should also apply to the mentally disabled person where a committee has not been appointed or where the committee lacks capacity to bring an action, in which case notice should be served on the public trustee. Time should not run, however, if the committee is unaware of the facts upon which the action is founded.

Finally, the Commission proposes that the definition of disability be widened to conditions that prevent the person from attending to his affairs, yet which do not constitute a mental disability (for example, a state of coma or unconsciousness). The formulation set out in the Uniform Act should be adopted: a person should be considered under a disability if he is "in fact incapable of the management of his affairs because of disease or impairment of his physical or mental conditions".[149] The limitation period is not suspended under the present Act if there is a committee appointed who is empowered to commence an action. This should be redrafted to include a "committee or other person appointed under The Mentally Disordered Persons Act". This will ensure that a person appointed under section 42 of that Act[150] (which applies to persons who are incapable of managing their affairs because of a mental infirmity arising from disease, age

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149 Uniform Limitations Act, s.15(1).

150 R.S.S. 1978, c.M-14.

or other cause) will be within the provision. Such appointees are not "committees", but are rather "quasi-committees" who may be granted some or all of the powers of a committee.

D. Confirmation: Acknowledgment and Part Payment

1. Scope of the Confirmation Provision

The present Limitation of Actions Act contains several provisions dealing with the effect of confirmation of liability by the defendant on the running of time. These provisions generally provide that time will start to run afresh when an acknowledgment or part-payment is made. The provisions are scattered throughout the Act:

1. Section 7 deals with part-payment or acknowledgment of a simple debt.
2. Sections 8 and 9 deal with part-payment or acknowledgment in the case of two or more joint debtors, joint contractors, joint obligors, joint covenantors or executors or administrators of the same.
3. Section 12 deals with part-payment and acknowledgment of legacies and charges on land.
4. Section 13 deals with part-payment and acknowledgment of moneys payable under an agreement for sale.
5. Section 14 deals with part-payment and acknowledgment of arrears of rent or damages in respect of such arrears.
6. Section 32 deals with acknowledgment of title to land.
7. Section 33 deals with acknowledgment of the mortgagor's title or his right to redeem.

8. Section 35 deals with part-payment by a mortgagor.

9. Section 36 deals with part-payment and acknowledgment of the purchaser's right in an agreement for sale.

10. Section 38 deals with part-payment and acknowledgment of the vendor's rights in an agreement for sale.

11. Section 41 deals with part-payment and acknowledgment on a conditional sale of goods.

The Commission is of the opinion that these provisions should be rationalized into a single provision relating to the confirmation of liability.

The New South Wales legislation provides the term "confirmation" be adopted as a generic term that covers both acknowledgement and part payment.[151] The legislation also contains further provisions that clarify what events are to be taken as a confirmation. These provisions have been substantially adopted in the British Columbia legislation[152] and in the Uniform Act. Section 17 of the Uniform Act provides inter alia:

(3) For the purposes of this section

(a) a person confirms a cause of action only if

(i) he acknowledges a cause of action, right or title of another, or

(ii) he makes a payment in respect of a cause of action, right or title of another;

(b) an acknowledgement of a judgment, debt or obligation has effect

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151 S.N.S.W. 1969, Act No. 31, s.54.

152 Limitations Act, R.S.B.C. 1979, c.236, s.5.

(i) whether or not a promise to comply with the judgment, to pay the debt or to perform the obligation can be implied therefrom, and

(ii) whether or not it is accompanied by a refusal to comply with the judgment, pay the debt or perform the obligation;

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and

(d) a confirmation of a cause of action to recover income due at a particular time operates also as a confirmation of a cause of action to recover income due at a later time on the same amount.

(4) Where a secured party has a cause of action to realize on property subject to a security interest

(a) a payment to him of principal or interest secured by the property; or

(b) any other payment to him in respect of his right to realize on the property or any other performance by another person of the obligation secured;

is, as against the payor or performer, a confirmation of the cause of action.

(5) Where a secured party is in possession of property which is subject to a security interest in his favour

(a) his acceptance of a payment to him of principal or interest secured by the property; or

(b) his acceptance of

(i) payment to him in respect of his right to realize on the property, or

(ii) any other performance by another person of the obligation secured;

is a confirmation by him to the payor or performer of the payor's or performer's cause of action to redeem the property.

The Commission recommends that a similar formulation be adopted.

A major issue that must be addressed is whether the traditional categories of actions in which confirmation is possible should be retained, or whether the scope of the confirmation provision should be widened to include all causes of action (the most notable exclusion under the present Act are claims for unliquidated damages).

The rationale for extending the period of limitation when a debt is acknowledged is as follows:

> Most men would agree that the law upon the limitation of actions should extend the period of limitation when a debtor acknowledges or promises to pay the debt. To give no such effect to acknowledgments would make it impossible for a creditor who did not wish to press the debtor too hard to refrain from suing him.[153]

Part-payment of a debt is generally accepted as a particular form of acknowledgment to which effect should be given. The usual rule in common law jurisdictions is that acknowledgment or part-payment made during the currency of the limitation period starts time running again.

However, there is disagreement concerning the scope of confirmation of liability and the range of actions to which it should be applied. In its 1967 report, the New South Wales Law Reform Commission recommended that all limitation periods should be capable of running anew whenever there was confirmation of

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153 J. Brunyate, Limitation of Actions in Equity, London: Stevens, 1932, at 150.

liability.[154] Although the Ontario Law Reform Commission found the New South Wales arguments persuasive, in the end it decided that it could not recommend a general extension of the effects of confirmation:

> It will be recalled that the Australian body pointed out that a claim for unliquidated damages, whether in contract or tort, will be more complicated and less the subject of a written record than claims for liquidated sums. It is this Commission's view that the New South Wales proposal might well create more difficulties than it would resolve. Furthermore, the nature of the debtor-creditor relationship is entirely different from that of the tortfeasor to the injured party. The role of acknowledgment in the former has a logical place in arrangements for giving extra time for payment.[155]

British Columbia accepted this position. The British Columbia Limitation of Actions Act provides that "this section does not operate to make any right, title or cause of action capable of being confirmed which was not capable of being confirmed before [the coming into force of the Act]".[156]

This Commission has arrived at the opposite conclusion, and proposes that the New South Wales position be adopted. There are two reasons for this decision. First, it is undesirable that reference should have to be made to the categories of actions contained in the present Act to determine whether confirmation is possible under the proposed Act. Second, it is unconvinced that an extension to unliquidated claims will cause any difficulties.

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154 N.S.W. Report, at paras. 250-54.

155 Ont. Report, at 124-5.

156 Limitation Act, R.S.B.C. 1979, c.236. s.5(10).

There is a well established line of case to the effect that where negotiations have reached the point that liability has been accepted by the defendant, leaving only the quantum of damages or compensation to be agreed upon or settled, the defendant will be estopped from pleading a statutory limitation which would impeach that liability.[157] This, in effect, creates a form of confirmation rule in respect of unliquidated claims. The problems of proof noted by the British Columbia and Ontario Commissions have not been found to be significant in such cases. The Commission is of the view, particularly in light of the writing requirement, that problems of proof will not be substantial. It is in agreement with the New South Wales Commission:

> [W]e think that an acknowledgment likely as it must be to encourage the claimant to defer taking proceeding, will in general and, if given carelessly, should be the occasion of loss to the person giving the acknowledgment rather than to the claimant.[158]

2. What Should Qualify as Confirmation

The present confirmation provisions generally require that an acknowledgment be "in writing" signed by the confirmor or his agent. It might be argued that the extension or the preservation

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157 For example see Philips v. C.N.R. (1914), 6 W.W.R. 1220 (Alta. S.C.); Johnson v. B.C. Hydro & Power Authority (1981), 123 D.L.R. (3d) 340 (B.C.S.C.). For the limits of this estoppel defence, see McLuskie v. Sakai, [1985] 6 W.W.R. 258 (B.C.S.C.).

158 N.S.W. Report, at para. 253.

of a remedy should not be made to depend upon the form which an acknowledgement takes and that an oral confirmation, if it can be proved, should be just as effective as a written one.

The Commission, however, shares the view of the other Commissions that there must be a formal acknowledgment of liability. This argument is even more compelling when one considers that the confirmation provisions have been extended to include all actions. Accordingly, it proposes that the formal requirements of the present law be retained. There are certain cases - those within which the estoppel rule applies - where the formal requirements should be relaxed. Rather than codifying these grounds, the rule should continue to operate outside the statute as it does not depend upon the acknowledgment per se, but on the conduct of the parties and the point of their negotiations.

3. Confirmation after the Expiry of the Limitation Period

At present, a confirmation made after the cause of action has expired will have the effect in some cases of reviving the cause of action.[159] A number of law reform bodies have recommended that a confirmation should not revive a cause of action after the expiration of the limitation period. Some have

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159 This will not occur where s.46 applies and the right and title to the property is extinguished.

justified this choice on the basis that they have proposed that the expiration of the limitation period extinguishes the right and not merely the remedy.

The Commission prefers to base its decision on practical grounds. To allow the right/remedy dichotomy to determine such important questions is to allow the tail to wag the dog. As a matter of policy, revival of an action should not be possible after expiration of the limitation period. The law should not permit the resurrection of ancient claims or grievances. The expansion of the scope of the confirmation rule so as to cover unliquidated claims, if combined with an expansive confirmation rule, would undermine this basic policy of limitations law. The policy for confirmation rules is that the parties should be permitted to promote consensual arrangements between the parties. This would in turn reduce the need for litigation: "[t]o give no such effect to acknowledgments would make it impossible for a creditor who did not wish to press the debtor too hard to refrain from suing him".[160] This policy does not apply where a limitation period has expired, for it is the creditor's unwarranted delay rather than his generosity that is responsible. Accordingly, a confirmation in the form of an acknowledgment should only be capable of extending the time period; it should not have the effect of reviving a cause of action.

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160 Supra, note 153.

4. Confirmation where more than Two Parties Involved

The present Limitation of Actions Act contains a number of provisions which deal with confirmation of liability where more than two parties are involved. It is difficult to discover any coherent policy for the distinctions that are drawn. In respect of joint debtors, the rule is that an acknowledgment of one of them does not bind the other.

Different rules apply in respect of mortgages. In the case of redemption actions, section 33(2) of The Limitation of Actions Act provides that where there is more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, "the acknowledgment if given to any of the mortgagors or persons, or his or her agent, is as effectual as if it had been given to all the mortgagors or persons". Thus, where there is more than one mortgagor, an acknowledgment to any one of them is regarded as an acknowledgment to all. However, this should be contrasted with the situation where there is more than one mortgagee. Here, subsection 33(3) of The Limitation of Actions Act provides that "an acknowledgment signed by one or more of the mortgagees or his or her agent in that behalf is effectual only as against":

(a) the party or parties so signing;

(b) the person or persons claiming any part of the mortgage money or property by, through or under him or them; and

(c) any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests;

> and does not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any undivided or divided part of the money or property.

So where there are two or more mortgagees only a proportional redemption will be possible where one mortgagee has acknowledged. The other, or others, will be able to claim the protection of the limitation period.

In the case of foreclosure actions, section 35 of The Limitation of Actions Act merely provides that when "any person bound or entitled to make payment of the principal money or interest secured by a mortgage of property real or personal or his agent in that behalf" pays part of the monies to a "person entitled to receive the same, or his agent" then the right to take foreclosure proceedings is deemed to have first accrued at the time when the payment was made. An acknowledgment of "title" will also start time running again. In other words no specific mention is made of the situation where there is more than one mortgagor or mortgagee. The intention of the section seems to be that the right to take foreclosure proceedings will be extended in those circumstances provided someone "bound or entitled to make payment" pays part of the mortgage monies or acknowledges title of the mortgagee.

This should be contrasted with section 3 of The Limitation of Civil Rights Act[161] which deals with acknowledgment in those

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[161] R.S.S. 1978, c.L-16.

mortgages or agreements for sale where an action will still lie on the covenant for payment:

> No payment hereafter made or acknowlegment hereafter given to a mortgagee of land or to a vendor of land, of or in respect of moneys payable under the mortgage or agreement of sale, shall have the effect of extending the time within which an action on the personal covenant for payment in the mortgage or agreement must be commenced by the mortgagee or vendor, except as against the person by whom the payment is made or the acknowledgment is given. This section applies with respect to all mortgages and agreements of sale whether given or made before, on or after the first day of April, 1939. In this section "mortgagee" and "vendor" include a person claiming through a mortgagee or vendor.

The Commission is of the view that these provisions should be replaced with a single provision which sets out the rule that a confirmation benefits only the person to whom it is made, and binds only the maker or his successor.

Where the action is in respect of title to property, the question is somewhat different. The Commission is of the view that the confirmation should be effective to bind third parties who take from the person making the confirmation, but only if the third party or the person from which the third party derives his title was not in possession of the property at the time the confirmation was made. Thus, a person cannot transfer property to a third party, and then later purport to confirm the cause of action so as to start time running afresh in respect of that third party.

A problem can arise where there is an abortive assignment for the benefit of creditors under the Bankruptcy Act.[162] The assignment is drawn up by the debtor and contains the names of his creditors. Once the assignment is made, the creditors are prohibited from commencing any action for the recovery of a claim.[163] Yet if the assignment is later cancelled, the creditor may find that the limitation period has expired. This may also occur when a proposal made under the Bankruptcy Act is annulled.[164] The Commission proposes that such admissions should be treated as acknowledgments even though they are made to a third party rather than to the creditor.

Finally, although it is perhaps not strictly necessary to do so, the Commission proposes that the provision should expressly state that a confirmation made by or to an agent has the same effect as if it were made by or to the principal.

E. Summary of Proposals

1. The running of time in certain personal actions should be postponed until the plaintiff knows or ought to have known:

   (a) the identity of the defendant;

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162 R.S.C. 1970, c.B-3, s.32.

163 Ibid., s.49.

164 Ibid., s.43.

(b) the facts upon which his action is based;

(c) that the injury suffered was significant.

2. The postponement of time for lack of knowledge should apply to:

(a) actions subject to a two year limitation period, other than an action to recover a penalty;

(b) actions based on fraud or deceit;

(c) actions in which material facts relating to the cause of action have been wilfully concealed;

(d) actions under The Fatal Accidents Act;

(e) actions for breach of trust other than an action based on fraudulent breach of trust or to recover trust property from a trustee.

3. An injury should be considered significant for the purposes of the postponement for lack of knowledge if a person would reasonably have considered it sufficiently serious to justify commencing an action against a defendant who did not dispute liability and was able to satisfy a judgment.

4. The running of time should not be postponed by reason of the defendant's absence from the jurisdiction.

5. The running of time should be postponed or suspended where the plaintiff is:

(a) a minor; or

(b) a person who is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition and he or his estate is not represented by a committee or other person empowered to commence an action on his behalf.

6. A potential defendant should be able to start time running notwithstanding a postponement or suspension by virtue of a disability by delivering a notice to proceed to the parent, guardian or committee, and to the public trustee.

7. The public trustee should be empowered to commence an action on behalf of the person under a disability if the parent, guardian or committee has failed to take reasonable steps to protect the interests of that person.

8. There should be one general provision dealing with confirmation of a cause of action which should operate by starting the time period to run afresh.

9. A cause of action should be capable of confirmation if there is an acknowledgment of the cause of action or if there has been a part payment in respect of it.

10. The proposed Act should adopt the provisions of the Uniform Limitations Act in clarifying the events that are to be considered confirmation of a cause of action.

11. A confirmation should operate whether or not the claim is for liquidated damages.

12. A confirmation by acknowledgment to be effective should be in writing and signed by the maker.

13. A confirmation to be effective should be made prior to the expiry of the limitation period.

14. A confirmation should benefit only the person to whom it is made and should bind only the maker of the confirmation, and his successors.

15. Section 3 of The Limitation of Civil Rights Act should be repealed.

16. A confirmation in respect of property should not be effective against a third party if the third party, or a person from whom he derives his title, was in possession.

17. A schedule of creditors produced by the debtor in proceedings under The Bankruptcy Act should be considered a confirmation even though it is not made directly to the creditor.

18. A confirmation by or to an agent should be considered a confirmation by or to the principal.

V. ASSERTION OF STATUTE BARRED CLAIMS IN OTHER PROCEEDINGS AND AMENDMENT OF PROCEEDINGS

A number of procedural difficulties can arise after a limitation period has expired, even though an action was commenced in time. These difficulties involve:

(1) set-offs;
(2) counterclaims;
(3) claims for contribution by a defendant;
(4) third party proceedings;
(5) amendment of pleadings setting up a new cause of action;
(6) amendment of pleadings substituting or adding parties.

A. Set-offs and Counterclaims

Section 11 of The Limitation of Actions Act contains the following provision in respect of set-offs and counterclaims:

> This Part [Part I] applies to the case of a claim of the nature hereinbefore mentioned, alleged by way of counterclaim or set-off on the part of a defendant.

Martin, J.A. in Reed v. Thiel[165] stated:

> It appears that in the case of a set-off the plaintiff must prove that the set-off was barred when the plaintiff commenced the action; the counterclaim, however, is different, and it is enough for the plaintiff to prove that the counterclaim was barred when it was pleaded. 166

This rule may have caused difficulties in the past when a set-off was permitted only in respect of liquidated claims: the defendant might find his counterclaim barred if the statement of

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165 [1928] 2 W.W.R. 115 (Sask. C.A.).

166 Ibid., at 122.

claim was issued during the limitation period, but served outside it. The Rules of Court have been broadened, however, so that a defendant may claim a set-off:

> (c) where a claim, whether of an ascertained amount or not, by the defendant arises out of the same dealings, transactions or occurrence giving rise to the claim of the plaintiff.167

Thus, any claim of the defendant that is not statute-barred at the time the plaintiff's action was commenced may be set-off if the claim relates to the same transaction. The Commission does not think that the result should differ if a related claim is pleaded as a set-off or as a counterclaim. The present distinction will only create a trap for the unwary lawyer.

Accepting, therefore, the proposition that set-offs and counterclaims related to the plaintiff's action should be treated similarly, the issue is whether all related set-offs and counterclaims, or only those which were not statute-barred at the time the plaintiff's action was commenced, should be capable of being set up.

The English Limitation Act, 1939[168] took the more limited approach. Section 28 provides:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

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167 Sask. Q.B. Rules, Rule 104A(1)(c).

168 2 & 3 Geo. 6., c.21; now Limitation Act, 1980, c.58, s.35.

The set-off or counterclaim will be permitted so long as it is not statute-barred when the plaintiff's action was initiated. There is no requirement that the counterclaim be related to the plaintiff's action. British Columbia takes a broader approach.[169] Set-offs and counterclaims statute-barred at the time the plaintiff's action is commenced will be permitted if they are related to the plaintiff's action.

The Commission favours the British Columbia approach (which is also favoured by the Uniform Law Conference). It is the relation to the original subject matter that makes it fair to bring the new claim forward.

B. Actions for Contribution

Claims by a defendant for contribution do not present any difficulties. The claim is made where a co-obligor seeks a contribution from other co-obligors upon discharging the common liability. The action is founded upon the principle of unjust enrichment.[170] The claim is not generally affected by the expiry of the time period in respect of the original action. The unjust enrichment does not occur until the other joint obligor is discharged. Thus, a six year limitation period will run from determination of the liability and not from the original date of breach.

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169 Limitations Act, R.S.B.C. 1979, c.236, s.4.

170 See Fridman & McLeod, Restitution, Toronto: Carswell, 1982 at 365.

No contribution claim lay between joint tortfeasors at common law. A statutory contribution was provided by The Contributory Negligence Act.[171] Section 11 provides a special limitation period for such actions:

> Where an action is commenced against a tort feasor or where a tort feasor settles with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tort feasor shall be defeated by the operation of any statute limiting the time for the commencement of action against that tort feasor if:
>
> (a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and
>
> (b) there has been compliance with any statute requiring notice of claim against that tort feasor.

The Commission does not propose any alteration to the law relating to actions for contribution.

C. Third Party Proceedings

A plaintiff is permitted to sue whom he chooses: the defendant cannot compel the addition of another party as a defendant. The defendant may, however, initiate third party proceedings. Williston and Rolls set forth the objects of third party procedure as follows:

> (1) to avoid a multiplicity of actions. The procedure provides a substitute for another action, and disposes of all issues arising out of a

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171 R.S.S. 1978, c.C-31.

transaction as between the plaintiff and the defendant, and between the defendant and a third party;

(2) to avoid the possibility that there might otherwise be contradictory or inconsistent findings in two different actions on the same facts;

(3) to allow the third party to defend the plaintiff's claim against the defendant;

(4) to save costs; and

(5) to enable the defendant to have the issue against the third party decided as soon as possible, in order that the plaintiff can not enforce a judgment against him before the third party issue is determined.[172]

The third party procedure may be in respect of a claim for contribution or indemnity, or it may be in respect of an independent cause of action by the defendant against the third party. A defendant may also have a third party added to the action by counterclaiming against both the plaintiff and the third party. In such a case, third party procedure is unnecessary.

Third party procedure does not generally affect the running of time.[173] The limitation period is calculated in the same

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172 The Law of Civil Procedure, Toronto, Butterworths, 1970, Vol. I, at 426-7.

173 One notable exception is subsection 143(2) of The Vehicles Act, 1983, S.S. 1978, c. V-3.1 which provides that the one year limitation period in respect of motor vehicle accident claims does not apply to counterclaims or third party proceedings.

manner as if an independent action had been initiated by the defendant against the third party.[174]

Alberta was the first common law province to alter this rule. In 1966 the following provision was added to the Alberta Limitation of Actions Act:

> When an action to which this Part applies has been commenced, the lapse of time limited by this Part for bringing an action is no bar to
>
> (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim, or
>
> (b) third party proceedings,
>
> with respect to any claims relating to or connected with the subject matter of the action.[175]

A similar provision has been adopted by British Columbia.[176]

The difficulty with this provision is that the third party loses the limitation defence even though he may have had no notice of his potential liability during the limitation period. The Alberta Institute of Law Research and Reform suggested that one solution would be "to require a defendant to file and serve an otherwise statute-barred counterclaim or third party notice

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174 The English Limitation Act, 1980, supra, note 168, has given legislative expression to this principle. Section 35 provides that a new claim made in or by way of third party proceedings is deemed to have been commenced on the date the proceedings were commenced.

175 S.A. 1969, c.49, s.3; now R.S.A., c.L-15, s.60(1).

176 Limitation Act, R.S.B.C. 1974, c.236, s.4.

within six months of being served with the statement of claim".[177] This proposal does not, however, cure the problem. The plaintiff may be able to take advantage of one of the provisions for the extension or suspension of the limitation period (if, for example, the cause of action has not been discovered until a later time). In such a case, the delay occurs before - not after - the action is commenced. The Alberta provision would have no application to such a case. For this reason the Commission is of the opinion that the court should have the discretion to disallow an otherwise statute barred claim by the defendant against a third party if that third party has suffered actual prejudice.

D. Amendment of Pleadings

The courts, at common law, took a restrictive attitude to amendments after the expiration of the statute of limitations. The classic statement of this principle can be found in Weldon v. Neal:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice

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177 Working Paper - Limitation of Actions (1977), at 67.

> the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.[178]

A similar position was taken where the amendment involved the addition or substitution of parties after the limitation period had expired. The earlier Saskatchewan decisions strictly applied this principle: an amendment would not be permitted except to "relieve against oppression or some other form of injustice".[179]

In 1940 this rule was altered.[180] The court was given an unfettered discretion to permit amendment of pleadings where a limitation period had expired, provided that the amendment did

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178 (1887), 19 Q.B.D. 394, at 395.

179 Clark v. Thomas J. Gaytee Studios Incorporated, [1930] 3 W.W.R. 489, at 492, (Sask. C.A.).

180 S.S. 1940, c.23, s.5; now The Queen's Bench Act, R.S.S. 1978, c.Q-1, s.27 (Rule 11).

not involve a change of parties. The common law rule continued, however, where there was a change of parties. This common law was later relaxed by the courts. The leading Saskatchewan decision is Walbaum v. G & R Trucking.[181] Mr. Justice Bayda undertook an extensive review of the more recent Canadian authorities and made the following observations:

1. A bona fide error by a plaintiff whose intention was to sue a person in a particular capacity (e.g., the owner of the car involved in a collision), is a factor favouring the application.

2. The exercise by the plaintiff of a deliberate choice of several known alternatives (and thereby arriving at the name of one defendant) is fatal to the application; conversely, the availability to the plaintiff of only one known defendant is a factor favouring the application.

3. The misnomer of the defendant in the sense that the plaintiff has chosen to sue the right person (and the proposed amendment does not involve the addition or substitution of a different and new party) but then has proceeded to mis-describe him (e.g. by using the wrong Christian name) is a factor favouring the application.

4. The misnomer of the defendant in the sense that the plaintiff unwittingly has chosen to sue the wrong person (and the proposed amendment involves the addition or substitution of a different and new party), but there is a clear relationship in interest, or a substantial connection between the original and the proposed defendant (e.g. an erroneous use of the name of an individual instead of a company substantially owned or controlled by the individual), is a factor favouring the application.

5. An attempt at substituting one party for another, who is unrelated in interest and unconnected to the first party and who has received an untimely notice of the litigation, is a factor fatal to the application.

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181 (1983), 144 D.L.R. (3d) 636 (Sask. C.A.).

6. Conduct by the proposed defendant, or his agent, that results in an inducement of the plaintiff's error is a factor favouring the application.

7. Inexcusable negligence by the plaintiff, or his agent, as a cause of the error, is a factor that militates against, but is not necessarily fatal to, the application.

8. Inexcusable delay in applying for the amendment is a factor that militates against, but is not necessarily fatal to, the application.

9. An untimely notice to the proposed defendant of the litigation, or the plaintiff's intention to involve the proposed defendant, thereby causing substantial prejudice to (the defence of limitation period aside), or a misleading of, the proposed defendant, is fatal to the application.[182]

Mr. Justice Bayda concludes that Canadian courts have been more lenient in allowing amendments "where there has been no real prejudice to the opposite party (apart from the right to rely on the statute of limitations), but at the same time, have been careful not to unfairly attenuate the exacting force of the limitation periods".[183]

In 1983 section 44, rule 11 of The Queen's Bench Act was amended[184] to read as follows:

> Notwithstanding that a limitation period has expired since the commencement of an action, the court may allow an amendment to the pleadings:

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182 Ibid., at 647-8.

183 Ibid., at 648.

184 S.S. 1983, c.59, s.5. See also Hackett v. Ginther, (Sask. C.A.), Feb. 12, 1986, #8752 (unreported) which confirms that the amendment was likely intended only as a legislative acknowledgment of the common law as set out in G & R Trucking.

> (a) asserting a new claim; or
>
> (b) adding or substituting parties;
>
> provided that the claim asserted by the amendment, or by or against the new party, arose out of the same transaction or occurrence as the original claim and the court is satisfied that no party will suffer actual prejudice as a result of the amendment...

This formulation does two things. In respect of amendments adding or substituting parties, it substantially adopts the principles set out by Mr. Justice Bayda. The two factors said to be fatal to the application (numbers 5 and 9 of the enumeration) are pre-conditions to the exercise of the discretion. Second, the provision replaces the unfettered discretion formerly given the courts to allow amendments that assert new claims.

The Commission is of the opinion that this provision works well. It proposes that the provision be repealed, but that a similar provision be added to the proposed Limitations Act. The Commission, in reaching this decision, considered the important work done by Professor Watson,[185] whose recommendations were adopted by the Uniform Law Conference. Section 20 of the uniform Act is as follows:

> 20(1) The court may allow an amendment changing the claim made in an action after the expiration of the limitation period for the action if the claim sought to be added by the amendment arose out of the facts set forth in the original pleadings.

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185 "Amendment of Proceedings after Limitation Periods" (1975), 53 Can. Bar Rev. 237.

20(2) The court may allow an amendment adding or substituting a plaintiff in an action or changing the capacity in which a plaintiff in an action sues, after the expiration of the limitation period for the action if

(a) the claim to be asserted by the new plaintiff, or by the original plaintiff in the new capacity, arose out of the facts set forth in the original pleadings;

(b) the defendant has, before the expiration of the limitation period for the action and the additional period provided by law for service of process, received formal or informal notice that he will not be prejudiced by the addition, substitution or change if allowed in defending on the merits; and

(c) the court is satisfied that the addition, or substitution of the new plaintiff or the change in the capacity of the plaintiff is necessary or desirable to ensure the effective enforcement of the claims originally made (or intended to be made) in the action.

20(3) The court may allow an amendment adding or substituting a defendant in an action, or changing the capacity in which a defendant in an action is sued, after the expiration of the limitation period for the action if

(a) the claim to be asserted against the new defendant, or against the original defendant in the new capacity, arose out of the facts set forth in the original pleadings; and

(b) the party to be added or substituted or the defendant to be assigned a new capacity in the action has, before the expiration of the limitation period for the action and the additional period provided by law for service of process, received formal or informal notice that he will not be prejudiced by being added or substituted, or by the change in capacity, if allowed, in defending on the merits.

This proposal is not radically different from the present Saskatchewan provision. In addition to the requirement that the party should not be prejudiced, there is a requirement that there be formal or informal notice. There is also a stricter requirement where an additional plaintiff is to be added. This is to prevent a non-diligent plaintiff riding the coat-tails of another plaintiff's action in order to evade a limitation period.

On balance, the Commission prefers to preserve the present Saskatchewan position. The present law appears to operate fairly, and the jurisprudence which has accumulated under it should be retained.

E. Summary of Proposals

1. Counterclaims and set-offs related to or connected with the plaintiff's action should not be barred by the expiry of a limitation period.

2. Third party proceedings related to or connected with the plaintiff's action should not be barred by the expiry of a limitation period unless the court is satisfied that the third party will suffer actual prejudice.

3. The court should be able to allow an amendment of pleading that asserts a new claim or that adds or substitutes a party after the expiry of the limitation period if the new claim arose out of the same transaction as the original claim and the court is satisfied that no party will suffer actual prejudice.

VI. MISCELLANEOUS PROBLEMS

A. Ultimate Limitation Period

The Commission has proposed an expanded set of events that will delay the running of time. Limitation periods should not, however, be delayed indefinitely. The New South Wales Commission recommended that after the passage of 30 years an action should be statute-barred notwithstanding any fraud, disability, lack of knowledge or confirmation of the cause of action.[186]

This was accepted by the British Columbia Commission: even where such special circumstances exist, there should be a point where the possibility of litigation is dead.[187] The Commission agrees. An ultimate limitation of 30 years should be imposed beyond which no action (other than those not subject to limitation periods) may be brought.

B. Extinguishment of Right

It is conventional wisdom that the statute of limitations operates only to bar the remedy but does not extinguish the right. This severing of rights and remedies has been criticised by Falconbridge:

> It may also be observed generally that "right" and "remedy" are ambiguous and misleading terms. A "right" is not something that has an objective existence independently of a "remedy"...[188]

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186 N.S.W. Report, at para. 241.

187 B.C. Report, at 101.

188 J.D. Falconbridge, "The Disorder of the Statutes of Limitation" (1943), 21 Can. Bar Rev. 669, at 788.

A right without a remedy is a hollow, empty thing. Furthermore, to speak of rights divorced from remedies is contrary to the tradition of the common law. It was the existence of the remedy that generally defined the right a person possessed.

Nevertheless, in certain isolated instances the courts have found that the right/remedy dichotomy is relevant. The Ontario Law Reform Commission outlined ten situations where the existence of a right after the barring of the remedy was significant.[189] They can be summarized, with some modifications, as follows:

1. Where a debtor pays money on account of debts, some of which are statute-barred and some not, and the money is not appropriated to any particular debt, the creditor may apply the money to one of the statute-barred debts.

2. An executor may, in the case of a general or residuary legatee under a will, deduct from the legacy the amount of any statute-barred debt from the estate.[190] Thus the legatee is treated as already receiving a part of the estate equivalent to the debt.

3. An executor may pay a statute-barred debt, even one owing by the estate to himself. However, his right to make such a payment ceases to exist if a court has declared in an administration suit that the debt is statute-barred.[191]

4. A trustee may pay statute-barred costs, and apparently statute-barred debts.[192]

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189 Ont. Report, at 126-133.

190 Re Dowsley, [1925] O.W.N. 545 (H.C.J.).

191 Meston v. Gray, [1925] 3 W.W.R. 656 (Sask. C.A.).

192 Re Green, [1923] 3 D.L.R. 48 (N.S.C.A.).

5. Certain liens and charges may be enforced although the debt which they secure may be statute-barred.[193]

6. When personal property is converted, the right (title) to that property still exists in the owner, although it is statute-barred. Consequently, if a fresh conversion takes place by a second person, the statute runs anew (against the second person).

7. Apparently a statute-barred creditor may present a bankruptcy petition and although the debtor may plead the statute, no other creditor can object.

8. A debt incurred as the result of a tort (for example, hospital expenses in a negligence action) may be claimed as part of the damages flowing from that tort notwithstanding that the debt has become statute-barred.

9. Where a claim is one to which foreign substantive law applies, the local limitation law is applied as it is regarded as procedural on the ground that it bars the remedy and does not extinguish the right.

10. The rule of equity that a debt owed to a testator by a person who becomes executor of his will should be treated as an asset of the estate[194] has been applied to a statute-barred debt.

To these, three further situations should be added. It is sometimes suggested that the right of recaption of chattels (a self-help remedy) may be exercised even though the time for bringing an action has expired. This does not, however, represent the position in Saskatchewan. The Court of Appeal in Phillips v. Murray[195] held that the right of recaption exists only where there is a right to recover the goods by judicial proceedings.

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193 London and Midland Bank v. Mitchell, [1899] 2 Ch.161.

194 Re Jeffers, [1940] O.W.N. 41 (H.C.J.).

195 [1929] 3 D.L.R. 770.

The second situation relates to the requirement that the limitation period should be specifically pleaded. It would appear that originally nothing turned on whether the expiration of the limitation period extinguished the right or merely the remedy. The reason that a limitation period had to be specifically pleaded was that it constituted a plea in "confession and avoidance".[196] This was encapsulated in the following rule:

> The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.[197]

Thus, the requirement that the limitation period be specifically pleaded originated out of the old law of pleading, rather than upon any right/remedy rationale. In 1878, Lord Cairns in Dawkins v. Lord Penryhn[198] found that the extinguishment of title of real property effected by the Statute of Limitations altered this position:

> With regard also to the Statute of Limitations as to personal actions, the cause of action may remain even although six years have passed. It cannot be predicted that the Defendant will appeal to the Statute of

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196 See Odgers on Pleading 5th ed., (Toronto: The Canadian Law Book Co., 1903) at 160-3.

197 English Rules of the Supreme Court, 1883, O.19, r.15; Saskatchewan Q.B. Rules (1961), R. 145. See now Q.B. Rules (1981), R.153.

198 (1878), 4 App. Cas. 51.

> Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the Defendant whether he desires to avail himself of the defence of the Statute of Limitations or not. But with regard to real property it is a question of title. The Plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way he may have it. Therefore, if upon the face of the bill the Plaintiff states that the period allowed by the statute has expired, he states in law that his title is extinguished, unless indeed he can bring himself within some of the exceptions under which the statute allows his title to continue. It is therefore clearly a case in which a demurrer where the facts appear upon the bill is applicable as a mode of defence.199

Following this case, the right/remedy dichotomy became the basis for determining whether limitation periods should be specifically pleaded.

Finally, it has been previously noted that a confirmation (by virtue of an acknowledgment or a part payment) made after the expiration of the limitation period will revive the cause of action where the statute merely extinguishes the remedy, but will not do so where the statute extinguishes the right.

The Commission is of the opinion that the right/remedy dichotomy should be abandoned as a rationale for determining the outcome of these questions, and that an issue-oriented approach be adopted. Indeed, this approach has been adopted throughout this report. The Commission has already addressed the question

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199 Ibid., at 58-9.

of the effect of a fresh conversion starting the statute running anew against a second converter,[200] and the effect of a confirmation in respect of a statute-barred action.[201] The Commission under a separate heading also deals with the choice of conflict of laws rules.[202]

It has been seen that the requirement that the limitation period be specially pleaded originally had nothing to do with whether or not it extinguished the right. The Commission believes that all limitation defences should be specially pleaded because of the potential for surprise.

Once these matters are disposed of, it is obvious that the right/remedy dichotomy is demoted in importance. It will govern only the unusual cases set out in the Ontario Report. Furthermore, only scant support can be found for some of these propositions. The rule that a statute-barred debt owed to a testator by a person who becomes an executor should be treated as part of the estate is derived from a Tasmanian case.[203] The New South Wales Commission concluded:

> We think it a useful reform to extinguish the right when the cause of action for its enforcement is barred and thus abolish a number of complicated rules of law which have little practical importance but stand merely

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200 Supra, at 49-52.

201 Supra, at 84-85.

202 Infra, at 111.

203 In Re Howlett, [1964] Tas. S.R. 63.

> as an occasional embarrassment to the student, the lawyer and the citizen.[204]

This Commission agrees. The important areas where the distinction matters have been specifically addressed. There is still a need for a residual rule for those rare cases where the existence of the right may still be relevant. The Commission is of the view that the expiration of the limitation period should extinguish the right as well as the remedy. The spectre of a right divorced from a remedy will only operate as a surprise and embarrassment to lawyers. The usual expectation is that the expiration of the limitation period puts an end to the matter.

C. Conflict of Laws

Under conflict of laws rules, the court of the jurisdiction where the action is brought will apply its own procedural law to actions brought before it, but applies the substantive law of the jurisdiction out of which the cause of action arose. If the

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[204] N.S.W. Report, at 323. See also Hackett v. Ginther, (Sask. C.A.), Feb. 12, 1986, #8752 (unreported) which treated a limitation as substantive rather than procedural in determining whether an amendment had retrospective effect (procedural legislation has retrospective operation, while substantive legislation generally has not). Mr. Justice Wakeling stated: "A person who has experienced the concern of wondering whether he shall be sued, finally having the peace of mind that comes from no action being commenced within a statutory period, shall surely have no doubt in his mind that subsequent legislation permitting a claim against him has all the trappings of substantive legislation".

limitation statute extinguishes the right, it is considered to be substantive; but if it bars the remedy, it is considered procedural.

This right/remedy dichotomy has been criticised as unrealistic. Unfortunately there is no consensus as to how this might be remedied. The Uniform law Conference examined three alternatives. These are as follows:

1. The law of limitations of the province shall be applied to all actions in the province to the exclusion of the law of limitations of all other jurisdictions.

2. The law of limitations shall be characterized as substantive law for the purpose of the application of the rules of the conflict of laws, whether or not the particular law bars the remedy or extinguishes the right.

3. Where it is determined that the law of another jurisdiction is applicable and the limitation law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply the limitation law of the province or may apply the limitation law of the other jurisdiction if a more just result is produced.[205]

The Uniform Law Conference preferred the first alternative.[206] They reasoned that limitations law exists to protect the reasonable expectations of those within the province, so therefore the jurisdiction's limitations law should apply to all actions brought within that jurisdiction. The Newfoundland Law Reform Commission, however, favoured the third

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205 Proceedings of the 61st Annual Meeting (1979), Uniform Law Conference of Canada, at 208.

206 See the Uniform Limitations Act, s.21.

alternative.[207] It noted that, unlike the statute proposed by the Uniform Law Conference, it was recommending that the limitations statute extinguish the right. Thus, its limitations law would be classified as substantive and would be applied by a foreign court. The third alternative would have the advantage of treating foreign limitations law that is classified as substantive in a like manner. The Newfoundland Commission thought that the third alternative afforded a flexibility that is desirable in conflicts rules.

This Commission is persuaded by the reasoning of the Newfoundland Commission, and proposes that where the law of another jurisdiction is to be applied in an action before a Saskatchewan court and the foreign limitations law is procedural, the court should have a discretion to apply the foreign limitations law if it produces a more just result.

D. Transition

The transition between the present limitations law and the proposed Act should not present a problem. The Commission proposes that the new legislation apply to all causes of action that accrue after the coming into force of the legislation. The legislation should expressly provide that it does not operate so as to revive a statute barred-action.

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207 Newfoundland Report, at 330-38.

E. Summary of Proposals

1. An ultimate limitation period of thirty years should be imposed notwithstanding any postponement, suspension or confirmation of the cause of action.

2. Limitation periods should be specially pleaded.

3. An extinguishment of the right of action should occur where the time limitation has expired.

4. Where a Saskatchewan court applying foreign law in an action before it and the foreign limitations law is classified as procedural, the court should have a discretion to apply that foreign limitations law rather than Saskatchewan limitations law if it produces a more just result.

5. The proposed limitations legislation should apply to all causes of action that accrue after the coming into force of the legislation. The legislation should not operate so as to revive a statute-barred action.

VII. SPECIAL LIMITATION PERIODS

A. General

Perhaps the single greatest problem plaguing Saskatchewan limitations law is the proliferation of special limitation periods. Numerous special limitation provisions are scattered throughout the statutes of Saskatchewan.[208] These provisions oust the general limitations law set out in The Limitation of Actions Act and substitute their own special rules.

This state of affairs is unacceptable for three reasons. First, the special limitation periods are invariably shorter than those provided by The Limitation of Actions Act. Typically, a limitation period of one year or less is created. Second, the special limitation periods for the most part contain only a bare limitation period. The rules of the general limitations law that provide for postponement or suspension of a limitation will not generally apply.[209] This, combined with the shortened period of time provided by many of the special limitation periods often lend themselves to great injustice: the problem with the hidden cause of action is exacerbated because of the much reduced period within which the injury must manifest itself.

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208 See J.P. Denis Pelletier, "Limitations in Saskatchewan Statutes" (1980-81), 45 Sask. L. Rev. 101; and "Limitations in Saskatchewan Statutes" (1983-84), 48 Sask. L. Rev. 325 for a list of special limitation periods.

209 An exception to this is section 6 of The Limitation of Actions Act, which provides that the suspension of the limitation period in cases of disability should apply to all limitation periods "in this Act or any other Act".

The third reason is that special limitation rules appear to be enacted on an ad hoc basis. The unique rules that govern each special period differ. Some special limitation provisions require notice to be given before an action is commenced; a few permit the court to relieve the plaintiff from an expired limitation period. In some the running of time commences when the conduct complained of occurs; in others time begins to run when the defendant's services are terminated. That there are so many periods creates a hidden trap for the unwary lawyer. The variation in wording among the various special limitation periods invites litigation on arid distinctions, and hinders the development of principles applicable to general limitations law.

As a result, special limitation provisions are arbitrary, unreasoned and inflexible. Why do the rules differ so greatly? Why, for example, should the running of time commence on the occurrence of the injury in the case of a registered nurse, and yet commence when services are terminated in the case of a psychiatric nurse? Why is the limitation period for actions against chiropractors only six months? Why do registered social workers deserve a one year limitation period when other social workers are not entitled to this special protection? Special limitations provisions appear to throw a "protective cloak" around many of the professions. This perception is extremely damaging, as it suggests a conspiracy between lawmakers and powerful lobby groups at the expense of victims.

The Commission proposes that special limitation periods be rationalized. All actions that are not genuinely unique should attract the same limitation rules, and so far as possible these rules should be brought within the general limitation of actions statute.

The Commission is of the opinion that this report should deal only with "true" limitation of actions: i.e., limitation periods governing actions brought before a court where success will result in the recovery of property or money damages or some similar award. Accordingly, the following classes of time limitations have been excluded from this report:

(1) time limits for the bringing of appeals;

(2) time limits on proceedings to quash bylaws of municipalities;

(3) time limits for challenging elections;

(4) time limits on the prosecution of provincial offences;

(5) time limited claims - i.e., claims that must be made or objections that must be taken to a body other than a court, such as a taxing authority, a Minister, or an administrative tribunal.

The remaining limitation provisions can then be broken down into the following categories:

(1) limitation periods that afford special protection to professional groups;

(2) limitation periods that afford special protection to other groups;

(3) limitation periods that govern particular classes of common law actions;

(4) limitation periods that govern actions or remedies created by statute;

(5) notice provisions.

B. Professional Groups

A substantial number of professional groups receive the protection of special limitation periods. Most of these set out a period of one year. To a certain extent, the development of such special provisions can be justified. An action against a professional can often be founded upon contract rather than in tort. This would permit the plaintiff to take advantage of a six year limitation period rather than the usual two year period, even though the essence of the action was the negligence of the defendant. The Commission is of the opinion that a six year period is too long, but it is also of the view that a one year period is inappropriate. Periods of one year or less place too onerous a burden on plaintiffs. In many cases it is not unreasonable to expect that it will take the plaintiff a full year to recover from the effects of the injury so as to be able to fully evaluate his situation, seek legal advice and then direct that proceedings be instituted if a settlement cannot be reached. Furthermore, very few of the special limitation provisions provide for the hidden cause of action. This is of particular concern where professional groups are involved, as the facts are often within their realm of knowledge. The limitation period will often have expired before the injury is discovered. The Commission is of the opinion that it is unfair to allocate

the risk in this fashion. The Commission is of the view that the two year period that it has proposed is appropriate, and that the proposals governing hidden causes of action should apply.

Accordingly, the Commission proposes that the following special limitation periods be repealed:

1. The Accredited Public Accountants Act, c. A-4, s.34.
2. The Certified General Accountants Act, c. C-4.1, s.35 (S.S. 1978 (Supp.), c. C-4.1).
3. The Chartered Accountants Act, c. C-7, s.34.
4. The Chiropractic Act, c. C-10, s.18.
5. The Dental Profession Act, 1978 c. D-5.1, s.57 (S.S. 1978 (Supp.), c. D-5.1).
6. The Denturist Act, c. D-7, s.30.
7. The Medical Profession Act, 1981, c. M-10.1, s.72, (S.S. 1980-81, c. M-10.1).
8. The Medical Radiation Technologists Act,* c. M-10.2, s.25 (S.S. 1983-84, c. M-10.2).
9. The Naturopathy Act, c. N-4, s.15.
10. The Opthalmic Dispenser Act, c. O-5, s.29.
11. The Optometry Act, 1985, S.S. 1984-85, c. , s.50.
12. The Osteopathic Practice Act, c. O-7, s.29.
13. The Physical Therapists Act, c. P-11, s.14).
14. The Physical Therapists Act, 1984,* c. P-11.1, s.30 (S.S. 1983-84, c. P-11.1).
15. The Psychiatric Nurses Act, c. P-36, s.21.
16. The Registered Psychologists Act, c. R-14, s.11.
17. The Registered Nurses Act, 1978, c. R-12.1, s.31 (S.S. 1978, c.45).

18. The Registered Occupational Therapists Act, c. R-13, s.22.

19. The Registered Social Workers Act, c. R-15, s.19.

20. The Saskatchewan Embalmers Act, c. S-15, s.44.

21. The Veterinarian Act, c. V-5, s.18.

22. The X-Ray Technicians Act, c. X-1, s.12.

*Not yet proclaimed.

C. Other Bodies

In addition to professional groups, the protection of special limitation periods is afforded to bodies such as school boards, provincial railways, hospitals and municipalities. These bodies are often public authorities or large institutions of a private nature that play a large and crucial role in the community. But does this special position justify the use of special limitation provisions? The New South Wales Law Reform Commission analyzed four principal grounds upon which such special treatment might be supported.[210] These are summarized below:

(i) financial considerations

It is argued that authorities will have difficulty preparing their budgets if the special limitation provisions are repealed. The authority will have a greater volume of litigation and greater exposure to liability without having an opportunity for advance financial planning to cover them.

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210 Third Report on the Limitation of Actions - Special Protections (1975), L.R.C. 21, at 28-31.

The New South Wales Commission rejected this contention, stating that:

> Limitation periods of twelve months or less have been shown in England, in some Australian States, and elsewhere, to be a hardship on plaintiffs. We think it unfair that such parties should be disadvantaged merely in aid of the budgeting of large instrumentalities of state that have public revenue resources to support them should any unexpectedly large liability in damages consume their annual allocation of funds.[211]

Furthermore, the authority has access to public risk insurance, and can use its past experience in making a forecast for the future.

(ii) difficulty in keeping records

It is argued that public authorities would be severely handicapped by having to retain records for longer periods. The New South Wales Commission found this unconvincing. It pointed out that there are many large commercial organizations which have activities as multifarious and diverse as public authorities, but which do not enjoy a special privilege.

(iii) loss of evidence

It is also argued that large instrumentalities have a substantial turnover of staff and that therefore there is a greater risk that testimony will be lost. But here again the authority is subject to the same constraints faced by other large organizations.

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[211] Ibid., at 28.

(iv) the element of risk

Finally, it is argued that public authorities, unlike other organizations, are not free to choose their activities. The view of the New South Wales Commission was that the use of unreasonably short limitation periods would force injured plaintiffs to subsidize government activity.

The Law Reform Commission of Saskatchewan recognizes that an unreasonable burden would be placed on public authorities if it could not gauge its potential liability. But a limitation period of one year or less is unreasonably short and unfairly operates against the injured victim. The two year period that would operate in the vast majority of disputes between plaintiffs and public authorities strikes a fair balance.

Other statutes, such as The Public Officers Protection Act, confer protection on persons acting in pursuance of a statute. The Commission is of the view that the mere fact that an act is authorized by statute provides no compelling reason for departing from the normal limitation rules.

Accordingly, the Commission proposes that the following special limitation periods be repealed:

1. The Education Act, c. E-0.1, s.95 (S.S. 1978 (Supp.), c.17) - school boards.

2. The Highways and Transportation Act, c. H-3, s.85(3) - Minister of Highways.

3. The Mental Health Act, c. M-13, s.59 - person acting in pursuance of Act.

4. The Hospital Standards Act, c. H-10, s.15 - hospitals.

5. The Northern Municipalities Act, c. N-5.1, ss.[113(6)(a)], 267(1), 269(4) & (5) (S.S. 1983, c. N-5.1) - northern municipality.

6. The Public Libraries Act, c. P-39, s.84(1) - library boards.

7. The Public Officers Protection Act, c. P-40 - persons acting in pursuance of a statute.

8. The Rural Municipality Act, c. R-26, ss. [376(1)], 378 - rural municipality.

9. The Saskatchewan Railways Act, c. S-33, s.191(1) - provincial railways.

10. The Urban Municipality Act, R.S.S. 1978, c.U-10, ss.[406(1)], 408, 416 - urban municipality.

11. The Urban Municipality Act, 1984,* c. U-11, ss[314(1) & (2)], 319(1), [321(4)] - urban municipality.

*Not yet proclaimed.

It should be noted that some of the limitation periods set out in The Northern Municipalities Act, The Rural Municipalities Act, and The Urban Municipalities Act are not in respect of common law actions.[212] No action could be maintained at common law by one of the public in respect of an injury sustained through a highway being out of repair.[213] The statutes, however, create a statutory duty of repair and attach to it a particularly short limitation period of three months. Nevertheless, these actions are sufficiently close to negligence actions to warrant

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[212] These provisions are indicated by square brackets on the above list.

[213] See Muirhead v. Nesbitt (1985), 15 D.L.R. (4th) 604 (Ont. C.A.).

similar treatment. This view is fortified once it is observed that these statutes apply a three month limitation period to all actions for damages.

If it is thought that those changes will expose municipalities to unacceptable levels of liability, the solution must be to change the law respecting municipal liability so as to separate those claims that should succeed from those that should not. Unreasonably short periods of limitation should not be used as a substitute.

The Crown is given preferential treatment in respect of actions for the return of overpaid taxes. The Commission is of the opinion that the Crown should be subject to the same six year limitation period that governs mistaken payments. It proposes that the following special limitation periods be repealed:

1. The Community Cablecasters Act,* c. C-17, s.30(2).
2. The Corporation Capital Tax Act, c. C-38.1, s.38(2) (S.S. 1979, c. C-38.1).
3. The Education and Health Tax Act, c. E-3, s.18(2).
4. The Fuel Tax Act, c. F-23.1, s.15(4) (S.S. 1982-83, c. F-23.1).
5. The Tax Enforcement Act, c. T-2, s.35.

*Not yet proclaimed.

D. Other Causes of Action

The discussion to this point has dealt with limitation periods governing actions against particular persons or bodies. Other special limitation periods govern particular actions to which the general limitation law would otherwise apply. The most significant are those that deal with automobile accidents.

Subsection 143(1) of The Vehicles Act, 1983[214] provides that no action may be brought for recovery of damages occasioned by a motor vehicle after 12 months from the time the damages were sustained. A similar limitation exists in respect of snowmobiles.[215]

Again, one must inquire whether there are any special circumstances that would justify a departure from the proposed two year limitation period that would otherwise apply. The British Columbia Law Reform Commission considered this question, and concluded that a one year period is inappropriate.[216] Often a claimant's injuries are not capable of being determined within one year, but require further assessment before a settlement can be reached. In many cases, the claimant is forced into a lawyer's office, and sometimes into litigation, when there is really no dispute and the claimant would prefer to settle the matter himself. Large insurance companies might argue that the

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214 R.S.S. 1978, c.V-3.1, (S.S. 1983, c.V-3.1).

215 R.S.S. 1978, c.S-52, s.33.

216 B.C. Report, at 108-110.

one year period is necessary for their budgeting and the management of their "inventory" of claims. These sorts of arguments have been rejected in respect of public authorities and other instrumentalities, and similar considerations apply to insurance companies. Injured plaintiffs should not be expected to subsidize insurance companies through the use of unreasonably short limitation periods. Accordingly, it is proposed that The Snowmobile Act and subsection 143(1) of The Vehicles Act be repealed.

A number of provisions in The Saskatchewan Insurance Act and The Automobile Accident Insurance Act limit the time within which the insured may bring an action against an insurer.[217] In most cases the period is one year. The obligation to pay money under a contract would normally attract a six year limitation period under the present Act.

The Commission has, however, proposed that a two year limitation period should be applied to most types of actions for breach of contract. The Commission therefore proposes that this two year limitation period should govern such claims.

There are a number of actions that are created by statute, but which are similar to common law actions. For convenience it is proposed that such limitation periods be moved to the general

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[217] See J.P. Denis Pelletier, "Limitations in Saskatchewan Statutes", supra, note 208 for a summary of these provisions.

limitation statute. The Commission proposes that the limitation periods in the following statutes be located in the proposed Limitation of Actions Act:

1. The Fatal Accidents Act, c. F-11, s.6 (one year after death).

2. The Privacy Act, c. P-24, s.9 (two years after violation).

Finally, section 14 of The Libel and Slander Act[218] provides that an action for libel contained in a newspaper shall be commenced within six months after the publication came to the notice of the person defamed. The Commission is of the view that newspapers should not be afforded a special limitation period, but should be governed by the same two year period applicable to defamation actions generally.[219] It is therefore proposed that section 14 of The Libel and Slander Act be repealed.

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218 R.S.S. 1978, c.L-14.

219 Both Alberta and Manitoba have repealed this six month period.

E. Actions or Remedies Created by Statute

Many statutes create rights or remedies that do not exist at common law. These statutory actions can be broken down into the following categories:

(i) Time limits on the setting aside of transactions or proceedings

1. The Arbitration Act, c. A-24, s.30(1).
2. The Bulk Sales Act, c. B-9, ss.19, 39.
3. The Forest Act, c. F-19, s.31(2).
4. The Fraudulent Preferences Act, c. F-21, s.5.
5. The Labour Standards Act, c. L-1, s.79(1).
6. The Matrimonial Property Act, c. M-6.1, s.30(2) (S.S. 1979, c. M-6.1).
7. The Real Estate Brokers Act, c. R-2, s.50(3).
8. The Reciprocal Enforcement of Maintenance Orders Act, 1983, R-4.1, ss.3(5).
9. The Small Claims Enforcement Act, c. S-51, s.32.
10. The Unconscionable Transactions Relief Act, c. U-1, s.8.

(ii) Actions against special funds

1. The Land Titles Act, c. L-5, c.204(1).
2. The Personal Property Security Act, c. P-6.1, s.53(2) (S.S. 1979-80, c. P-6.1).

(iii) Actions for maintenance

1. The Children of Unmarried Parents Act, c. C-8, s.9.
2. The Dependants' Relief Act, c. D-25, s.15.
3. The Deserted Wives' and Children's Maintenance Act, c. D-26, s.2(b)(iii).

(iv) Actions for wages

1. The Trust Companies Act, c. T-21, s.54(1).
2. The Wages Recovery Act, c. W-1, s.22.

(v) Special actions created by statute

1. The Consumer Products Warranties Act, c. C-30, s.30.
2. The Expropriation Procedure Act, c. E-16, s.27.
3. The Matrimonial Property Act, c. M-6.1, s.30(2).
4. The Mechanics' Lien Act, c. M-7, s.8(2).
5. The Provincial Lands Act, c. P-29, 80.
6. The Public Works Creditors Payment Act, c. P-47, s.11(1).

(vi) Miscellaneous pieces of statutory machinery

1. The Condominium Property Act, c. C-26, s.10.4(1) (S.S. 1978 (Supp.), c.8, s.4).
2. The Creditors Relief Act, c. C-46, ss.22(9), 32(b).
3. The Limitation of Civil Rights Act, c. L-16, ss.13(2), 30(1).
4. The Northern Municipalities Act, c. N-5.1, s.96(4) (S.S. 1983, c. N-5.1).
5. The Queen's Bench Act, c. Q-1, s.77(1).
6. The Thresher Employee Act, c. T-12, s.13.

When an Act creates rights that do not exist at common law, one should expect to find any qualification or restriction of that right, including any time limitation, in that particular statute. These limitation periods are usually very specific and it would likely be difficult to understand their import if they

were isolated from the other provisions of the statute. Accordingly, it is not proposed that these limitation periods be removed to the general limitations statute.

F. Notice Provisions

There are two types of notice provisions. The first requires the giving of notice before an action is brought. An example of this is subsection 33(1) of The Public Trustee Act,[220] which provides that no action shall be brought against a person in respect of whom a certificate of incompetence has been granted unless 30 days' notice is given to the Public Trustee. Such provisions are innocuous, though they do have the effect of shortening the limitation period somewhat. The Commission does not recommend the deletion of such notice provisions.

The second type of notice provision is one that prohibits the bringing of an action unless notice is given within a certain time after the cause of action arises. Often the time limit is very short. For example, under The Highways and Transportation Act[221] notice of an action for damages caused by the disrepair of a highway must be given within thirty days of the accident. In some cases there is a discretion in the court to disregard a failure to give notice where there was a reasonable excuse for

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220 R.S.S. 1978, c.P-43.1.

221 R.S.S. 1978, c.H-3.

the failure and the defendant was not prejudiced.[222]

The notice provisions that are of concern to the Commission are as follows:

1. The Conservation and Development Act, c. C-27, s.30(2).
2. The Highways and Transportation Act, c. H-3, s.85(3).
3. The Northern Municipalities Act, c. N-5.1, s.113(6)(b).
4. The Rural Municipalities Act, c. R-26, ss.376(2), 377(1) & (2), 378.
5. The Urban Municipality Act, c. U-10, ss.406(2),407.
6. The Urban Municipality Act, 1984,* c.U-11, s.314(2).
7. The Watershed Associations Act, c.W-11, s.23(2) (S.S. 1979, c.81, s.5).

*Not yet proclaimed.

The purpose of these provisions is to permit the defendant to investigate the accident or occurrence and collect evidence as soon as possible.

The Ontario Law Reform Commission stated that it "does not believe that a person should be absolutely barred from bringing an action merely because he has failed to give the notice required".[223] It proposed that notice provisions also contain a proviso that the court may waive the notice if there is a reasonable excuse for the failure to notify and that the defendant will not be prejudiced. The Law Reform Commission of

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[222] See for example The Rural Municipality Act, R.S.S. 1978, c.R-26, s.376(2).

[223] Ont. Report, at 84.

British Columbia went further and proposed that such notice provisions be abolished altogether.[224] The Commission prefers the approach of the British Columbia Commission.

These special notice provisions are generally known only to lawyers. It is not reasonable to expect that a person involved in an accident will have sought legal advice within a week or a month of an accident. Thus, the majority of claimants must go before a court and attempt to overcome the heavy onus of establishing that the failure to notify was justified and that the defendant was not prejudiced.

In addition, one may well question whether there is anything truly unique about the evidentiary problems in such actions. In the case of an action relating to the disrepair of a road, it seems that there will be a smaller likelihood of lost evidence than in other tort actions. Throughout this report the Commission has embraced the idea that the law of limitations should not give preferential treatment to certain groups of defendants at the expense of their victims. Accordingly, it proposes that the above-mentioned notice provisions be repealed.

G. Summary of Proposals

1. The special limitation rules for professional groups should be abolished.

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[224] B.C. Report, at 116.

2. The special limitation periods for government bodies and other large institutions should be abolished.

3. The limitation period under section 143 of The Vehicles Act and section 33 of The Snowmobile Act should be repealed.

4. The limitation periods set out in The Saskatchewan Insurance Act and The Automobile Accident Insurance Act should be extended to two years in respect of accident, sickness, fire and automobile accident claims.

5. The limitation period for claims under The Fatal Accidents Act and The Privacy Act should be two years and should be contained in the general statute.

6. Limitation periods in respect of rights or remedies that did not exist at common law should continue to be contained in the statute that creates the right or remedy.

7. Notice provisions that bar an action unless notice is given should be abolished.

VIII. THE PROPOSED ACT

SHORT TITLE AND INTERPRETATION

Short Title 1. This Act may be cited as The Limitations Act.

Interpretation 2. In this Act:

"action" (a) "action" includes any proceeding in a court and any exercise of a self-help remedy;

"judgment" (b) "judgment" means a judgment or order of a court, or an award pursuant to an arbitration to which The Arbitration Act applies;

"security interest" (c) "security interest" means an interest in property that secures payment or performance of an obligation but does not include the interest of a vendor who retains title to land as security for the purchase price;

"trust" (d) "trust" includes express, implied, resulting and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a security interest in property.

RULES OF EQUITY

No interference with certain rules of equity 3. Nothing in this Act:

(a) interferes with a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;

(b) interferes with a rule of equity that refuses relief, on the grounds of laches, to a person claiming equitable relief, whose right to bring an action is not barred by this Act.

LIMITATION PERIODS

Actions subject to two year limitation period

4. The following actions shall not be brought after the expiration of two years after the a date on which the right to do so arose:

(a) an action in contract other than an action specifically mentioned in section 5, 6 or 7;

(b) an action in tort other than an action specifically mentioned in section 5, 6 or 7;

(c) an action under The Fatal Accidents Act;

(d) an action in tort under The Privacy Act;

(e) a civil action by the Crown or any other person to recover a fine or other penalty imposed under any Act.

Actions subject to a ten year limitation period

5. The following actions shall not be brought after the expiration of ten years after the date on which the right to do so arose:

(a) an action against the personal representative for a share of the estate;

(b) an action against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was privy;

(c) an action against a trustee for the conversion of trust property to the trustee's own use;

(d) an action to recover trust property or property into which trust property can be traced against a trustee or any other person;

(e) an action to recover money on account of a wrongful distribution of trust property against the person to whom the property is distributed, or a successor.

Actions not subject to a limitation period

6.-(1) The following actions are not governed by any limitation period and may be brought at any time:

(a) an action by a debtor in possession of property subject to a security interest to redeem the property;

(b) an action by a secured party in possession of property subject to a security interest to realize on the property;

(c) an action for possession of land by a life tenant or remainderman;

(d) an action relating to the enforcement of an injunction or a restraining order;

(e) an action to enforce an easement, restrictive covenant, or profit-a-prendre;

(f) an action for a declaration as to personal status;

(g) an action for or declaration as to the title to property by any person in possession of that property;

(h) an action for possession of land where an owner has been dispossessed under circumstances amounting to trespass;

(i) an action by a purchaser to obtain title to land under an agreement for sale;

(j) an action by a vendor for cancellation under an agreement for sale of land; and

(k) an action on a judgment for the possession of land.

(2) In an action by a purchaser to obtain title to land under an agreement for sale, the amount required to be paid by the purchaser to the vendor shall not include interest

accruing after the expiration of six years after the last payment under the agreement for sale became due.

Actions subject to a six year period

7.-(1) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.

(2) Without limiting the generality of subsection (1), the following actions shall not be brought after the expiration of six years after the date on which the right to do so arose:

(a) an action to recover a debt whether secured or not;

(b) an action for restitution or unjust enrichment, other than an action based on a constructive trust;

(c) an action by a secured party not in possession of property subject to a security interest to realize on the property;

(d) an action by a debtor not in possession of property subject to a security interest to redeem the property;

(e) an action for damages for conversion or detention of goods or chattels;

(f) an action to recover goods or chattels wrongfully taken or detained;

(g) an action by a tenant against his landlord for possession of land; and

(h) an action on a foreign judgment.

(3) Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him:

(a) a further cause of action for the conversion or detention of the goods;

(b) a new cause of action for damage to the goods; or

(c) a new cause of action to recover the proceeds of a sale of the goods;

accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of six years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

CONFIRMATION, POSTPONEMENT AND SUSPENSION OF LIMITATION PERIODS

Confirmation of cause of action

8.-(1) Where, after time has commenced to run but before the limitation period has expired, a person against whom an action lies confirms the cause of action, the time during which the limitation runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

(2) For the purposes of this section:

(a) a person confirms a cause of action only if he:

(i) acknowledges a cause of action, right, or title of another; or

(ii) makes a payment in respect of a cause of action, right, or title of another;

(b) an acknowledgment of a judgment or debt has effect:

(i) whether or not a promise to pay can be implied from it; and

(ii) whether or not it is accompanied by a refusal to pay;

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money;

(d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same amount.

(3) Where a secured party has a cause of action to realize on property subject to a security interest:

(a) a payment to him of principal or interest secured by the property;

(b) any other payment to him in respect of his right to realize on the property or any other performance by any other person of the obligation secured;

is a confirmation by the payer or performer of the cause of action.

(4) Where a secured party is in possession of property subject to a security interest:

(a) a payment to him of principal or interest secured by the property; or

(b) any other payment to him in respect of his right to realize on the property or any other performance by another person of the obligation secured;

is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the collateral.

(5) For the purposes of this section, an acknowledgment of a cause of action is not binding unless it is in writing and signed by the person giving the acknowledgment.

(6) For the purposes of this section, a person has the benefit of a confirmation only if the confirmation is made to him, or to a person through whom he claims, or if the

confirmation is made in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy Act (Canada).

(7) For the purposes of this section, a person is not bound by a confirmation unless:

(a) he is a maker of the confirmation;

(b) after the making of the confirmation the person becomes, in relation to the cause of action, a successor of the maker;

(c) the maker is a trustee at the date of confirmation, and the person at that date or thereafter becomes a trustee of the trust to which the maker is a trustee; or

(d) the person is bound under subsection (8).

(8) Where a person who confirms a cause of action:

(a) to recover property;

(b) to enforce an equitable estate or interest in property;

(c) to realize on property subject to a security interest;

(d) to redeem property subject to a security interest;

(e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of property subject to a security interest or income or profits of such property or by way of sale, lease, or other disposition of such property or by way of other remedy affecting such property; or

(f) to recover trust property into which trust property can be traced;

is on the date of confirmation in possession of the property, the confirmation binds any other person in possession during the continuance of the limitation period unless

that other person was in possession of the property on the date of the confirmation or claims through a person, other than the maker of the confirmation, who was in possession of the property on the date of the confirmation.

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

Postponement where trust

9. The running of time with respect to the limitation period fixed by this Act for an action:

(a) based on fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use;

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

Postponement of limitation period

10.-(1) The running of time with respect to the limitation period fixed by this Act for an action to which this section applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case, he ought to know:

(a) the identity of the defendant;

(b) the facts upon which his action is founded; and

(c) that the injury suffered was significant.

(2) Subsection (1) applies only to:

(a) actions subject to a two year limitation period other than an action to recover a penalty;

(b) actions based on fraud or deceit;

(c) actions in which material facts relating to the cause of action have been wilfully concealed;

(d) actions for breach of trust not within section 9.

(3) For the purposes of subsection (1), an injury is significant if a person would reasonably have considered it sufficiently serious to justify instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(4) This section (1) does not operate to the detriment of a bona fide purchaser for value.

Persons under disability

11.-(1) For the purpose of this section, a person is under a disability:

(a) while he is a minor;

(b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition and he or his estate is not represented by a committee or other person appointed under The Public Trustee Act or The Mentally Disordered Persons Act who has the legal capacity to commence the course of action on behalf of that person or his estate.

(2) Where a person is under a disability at the time his right to action arises, the beginning of the limitation period is postponed so long as that person is under a disability.

(3) Where a person who has a cause of action comes under a disability after the limitation period for the action has begun to run but before the expiration of it, the running of the limitation period for the action is suspended until he is no longer under a disability.

(4) Notwithstanding subsections (2) and (3), where a person under a disability has a cause of action against another person, that other

person may cause a notice to proceed with the action to be delivered in accordance with this section, and the limitation period begins to run against the person under the disability as if he had ceased to be under the disability on the date on which the notice to proceed was delivered.

(5) A notice to proceed mentioned in subsection (4) shall:

(a) be in writing:

(b) be addressed or delivered:

(i) in the case of a minor, to his parent or guardian, as the case may be, and to the Public Trustee, and

(ii) in the case of a person incapable of the management of his affairs because of disease or impairment of his physical or mental condition, to the committee or other person appointed under The Mentally Disordered Persons Act, and to the Public Trustee;

(c) state the name of the person under the disability;

(d) specify the circumstances out of which the cause of action may arise with such particularity as is necessary to enable a determination to be made as to whether the person under the disablity has or may have a cause of action;

(e) give warning that the cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;

(f) state the name of the person on whose behalf the notice is delivered; and

(g) be signed by the person delivering the notice or his solicitor.

(6) Where there is no parent, guardian, committee or other person to whom notice can be given under subsection (5), the Court of Queen's Bench may appoint a guardian ad litem; and

the notice referred to in subsection (5) may thereafter be given to the guardian ad litem and to the Public Trustee.

(7) Subsection (4) does not apply to a person under a disability in bringing an action against his parent or guardian, the committee or other person appointed for him, or the Public Trustee.

(8) The delivery of a notice to proceed under this section operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

(9) The onus of proving that the beginning of a limitation period for an action has been postponed or suspended under this section rests on the person claiming the benefit of the postponement or suspension.

(10) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

(11) Where a notice to proceed under this section is delivered to the Public Trustee and it appears to him that the other person to whom the notice was delivered has failed to take reasonable steps to protect the interests of the person under the disability, the Public Trustee shall:

(a) investigate the circumstances specified in the notice; and

(b) if he believes that an action for the benefit of the person under the disability would have a reasonable prospect of succeeding and would result in a judgment that would justify the bringing of the action, commence and maintain such an action.

(12) The Lieutenant Governor in Council may make regulations prescribing the form, content and method of delivery of and other matters relating to notices to proceed to be delivered under this section.

Ultimate limitation period

12.-(1) Subject to section 6, but notwithstanding a confirmation made under section 8 or a postponement or suspension of the running of time under section 9, 10 or 12, no action to which this Act applies shall be brought after the expiration of thirty years from the date on which the right to do so arose.

(2) Subject to subsection (1), the effect of sections 9, 10, and 11 is cumulative.

EXTINGUISHMENT OF RIGHT

Extinguishment of cause of action and title

13.-(1) When a limitation period expires and the right to bring an action is thereby barred, the cause of action upon which the action was based and any title involved are extinguished.

ASSERTION OF STATUTE BARRED CLAIMS IN OTHER ACTIONS AND AMENDMENT OF PROCEEDINGS

Assertion of statute barred claims in other proceedings

14.-(1) Where an action has been brought, the expiry of the limitation period for bringing an action or a claim does not bar the making of that claim in the action originally brought:

(a) by way of counterclaim, including the addition of a new party as a defendant by counterclaim;

(b) by way of third party proceedings; or

(c) by way of set off;

under any applicable law if the claim is related to or connected with the action originally brought, and the action originally brought is not barred by the expiry of a limitation period.

(2) A court may disallow third party proceedings permitted under subsection (1) if it is satisfied that the third party will suffer actual prejudice.

Amendment of pleadings

15.-(1) Notwithstanding that a limitation period has expired since the commencement of an action, the court may allow an amendment of the pleadings:

(a) asserting a new claim; or

(b) adding or substituting parties;

if the claim asserted by the amendment, or by or against the new party, arose out of the same transaction or occurrence as the original claim and the court is satisfied that no party will suffer actual prejudice as a result of the amendment.

GENERAL

Conflict of laws

16. Where it is determined in an action that the law of a jurisdiction other than Saskatchewan is applicable and the limitation law of that jurisdiction is, for the purposes of private international law classified as procedural, the court may apply Saskatchewan limitations law or may apply the limitations law of the other jurisdiction if a more just result is produced.

Crown bound

17. The Crown is bound by this Act.

Transition

18.-(1) Subject to subsection (2), this Act applies to all actions that arise after the coming into force of this Act.

(2) Nothing in this Act revives a cause of action that is barred at the coming into force of this Act.

IX. SYNOPSIS OF MAJOR PROPOSALS

1. At present some tort actions are subject to a two year limitation period, while actions for breach of contract are generally subject to a six year limitation period. This presents a problem because courts have recently recognized that the same act may give rise to overlapping actions in both contract and tort. The Commission proposes that a two year limitation period apply to all personal actions whether in contract or in tort, other than actions in debt and actions for conversion or detention of property which should be subject to a six year limitation period. See pages 14 to 19.

2. Under the present Act, periods of limitation governing actions for breach of trust are often difficult to ascertain, particularly where a constructive trust is involved. The Commission proposes that express, resulting and constructive trusts be treated similarly. A six year limitation period should generally apply to such actions, but the limitations statute should identify more serious breaches that are subject to a ten year limitation period. See pages 20 to 27.

3. The provisions of the present Act dealing with land are largely a consolidation of earlier English limitation statutes inherited by Saskatchewan. For the most part, these provisions do not sufficiently take into account the fundamental changes brought about by the enactment of a Torrens system of land registration. For example, under the Torrens system the vast majority of mortgages are merely charges registered against the mortgagor's title. The present limitations statute sets out a limitation period for the mortgagor's action for redemption; however, this contemplates the earlier system under which legal title was conveyed to the mortgagee. The Commission proposes that limitations law be changed so as to better accommodate land titles law.

   Of particular concern is the limitation period that is to be applied to agreements for sale of land. The Commission has considered two alternatives. An agreement for sale might be equated with a mortgage, so that if a vendor fails to commence an action for cancellation within a limitation period, a purchaser in possession of the land may apply to court for an order having the title transferred to him. The second alternative, tentatively favoured by the Commission, is to provide that an action by either the vendor or the purchaser under an agreement for sale is not subject to a limitation period. The vendor at any time may bring an action for cancellation, and a purchaser may at any time bring an action to obtain title to the land by tendering the price. The amount required to be paid by the

purchaser should, however, be limited to the principal owing together with interest accruing in the six year period following the date when the last payment under the agreement for sale became due. See pages 34 to 56.

4. Under the present law, there is considerable confusion regarding the time when a limitation period commences. Originally, the rule was that the plaintiff's lack of knowledge was not relevant: the limitation period began to run when all essential elements had occurred, even though the plaintiff was unaware of the injury or breach. In Canada the judiciary has made a number of significant inroads into this rule. The Commission proposes a more comprehensive legislative solution. The limitation period for most personal actions should not commence to run until the plaintiff knew or ought to have known the identity of the defendant, the facts upon which the action is founded, and that the injury suffered was significant. See pages 57 to 72.

5. Provisions relating to acknowledgment and part-payment are scattered throughout the present Limitation of Actions Act. The Commission proposes that these should be consolidated into a single provision that clearly indicates the circumstances under which an acknowledgment or part-payment will start the time running afresh. See pages 78 to 89.

6. A number of the Commission's proposals would result in a postponement, suspension or extension of the running of time which could conceivably keep an action alive for an extremely lengthy period of time. The Commission proposes that an ultimate limitation period of 30 years be imposed beyond which no action may be brought. See page 105.

7. Under present limitations law, the expiration of a limitation period operates only to bar the remedy; it does not extinguish the right. This distinction has significance in a number of situations (such as the conflict of laws). The Commission is of the opinion that the right/remedy dichotomy should not determine the outcome of these questions. Instead, each situation should be individually examined and an appropriate rule should be developed. There is still, however, a need for a residual rule in the rare case where the distinction may still be relevant. The Commission proposes that the expiration of the limitation period should extinguish the right, since this is in accord with the expectation that the expiration of a limitation period brings the matter to an end. See pages 105 to 113.

8. The proliferation of special limitation periods is likely the single greatest problem plaguing limitations law in Saskatchewan. The limitation periods are invariably short and inflexible. The Commission proposes that all actions that are not genuinely unique should be subject to the

general limitations statute. The Commission proposes the repeal of many of the special limitation periods presently in existence. For example, the special one year limitation period set out in The Vehicles Act, 1983 that governs an action for the recovery of damages occasioned by a motor vehicle should be repealed. Such an action should instead be governed by the two year limitation period for personal actions that is provided in the proposed statute. See pages 115-132.

9. The Commission proposes a number of other changes that would modernize limitations law covering such topics as the time period for restitutionary actions (see pages 27-30), and procedural matters such as the assertion of statute-barred claims in other proceedings and the amendment of pleadings or addition of parties after the expiration of a limitation period (see pages 92 to 104).